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IN THE

Supreme Court of the United States

October Term, 1949.

No. 248

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

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IN THE

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No.....

JOHN HOWARD LAWSON,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, John Howard Lawson, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia, rendered on June 13, 1949. On June 16, 1949, petitioner moved the Court of Appeals for an extension of time to July 5, 1949, to file a petition for rehearing. This motion was denied on June 23, 1949. On motion of petitioner, he was granted an extension of 30 days to August 12, 1949, in which to file this petition in this Court.

The petitioner was indicted under Rev. Stat., sec. 102, as amended by C. 594, Act of June 22, 1938, 52 Stat.

942, U. S. C., Title II, sec. 192 [J. A. 9];[1] was found guilty by a jury verdict on the 19th day of April, 1948 [J. A. 43]; and thereafter, on the 21st day of May, 1948, was sentenced to one year in jail and fined $1,000.00 [J. A. 44].

The petitioner perfected an appeal to the United States Court of Appeals, for the District of Columbia. While the appeal was pending in the Court of Appeals, the petitioner filed in this Court a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia (No. 334, Oct. Term, 1948). Said petition was denied November 8, 1948. Thereafter, the Court of Appeals affirmed the trial court judgment and this petition is directed to said judgment of affirmance. The opinion below has not yet been officially reported.

Statement of Matter Involved.

Petitioner, John Howard Lawson, a dramatist and screen writer (25 Who's Who, 1948, p. 1436) was summoned as a witness by the House Committee on Un-American Activities (hereinafter referred to as "the Committee") to testify at the hearings described below [J. A. 188].

Between October 20 and October 30, 1947, members of the Committee, purporting to act as a sub-committee, held hearings, in Washington, D. C., on the subject, as designated by them, "Communist Infiltration of the Motion Picture Industry" [J. A. 197].

The petitioner was not a voluntary witness. He appeared in response to subpoena served upon him at his residence in California [J. A. 381].

---

[1]Pursuant to paragraph 7 of Supreme Court Rule 38, there are filed herewith copies of the joint appendix printed for use in the United States Court of Appeals, for the District of Columbia. References "J. A." are to pages of that printed record.

At the outset of the hearings (according to petitioner's offer of proof), counsel for petitioner presented to the Committee a motion to quash the Committee's subpoena [rejected Exhibits 4 and 5 for identification, J. A. 394-406], and were advised by the Chairman that the motion should be renewed before petitioner was called to the stand [J. A. 212].

Twenty-four witnesses preceded the petitioner [J. A. 200]. Some of the witnesses testified that petitioner was a Communist, active as such in the motion picture industry, and attacked his character, integrity, and reputation [J. A. 223-235]. Prominent employers in the motion picture industry, some of whom preceded petitioner on the witness stand and others of whom followed him, were directly asked by the Committee to discharge petitioner Lawson, and others, to establish a blacklist and to use the Motion Picture Producers Association of America as an instrumentality for the effectuation of that blacklist [J. A. 240-242; see also offers of proof referred to below, pp. 513-545].

As petitioner offered to prove [J. A. 212], his counsel renewed in writing their motion to the Committee to quash the Committee's subpoena [rejected Exhibit 6 for identification, J. A. 406] on October 27, 1947, and at the same time filed a written "Application to Compel the Return of Witnesses for the Purposes of Cross-Examination" [rejected Exhibit No. 7 for identification, J. A. 409].

By his renewed motion to quash, petitioner raised before the Committee constitutional objections that the subject matter of the investigation was outside the power of the Committee as an agency of government, that the investigation had the non-legislative object and aim of estab-

lishing and maintaining "a system of blacklists and to tell the motion picture industry whom to hire and whom to fire, without regard to the ability or talent of the employee involved and without regard to the choice of the particular employer" [rejected Defendant's Exhibit 6, J. A. 407] and had the non-legislative object and aim "to direct the motion picture industry to make only those films which the Committee feels reflect its ideas of the American way of life. This investigation is thus intended to deprive not only the motion picture industry of its free choice to select film subjects. More important, it will deprive the American people of the privilege of selecting such films as they may desire to see, solely upon the basis of quality, content and the public's unhampered choice." [Rejected Exhibit 6, J. A. 407.]

By his written application for the allowance of cross-examination of witnesses who had testified before the Committee against him, petitioner asserted and offered to prove to the Committee that these witnesses conspired with the Committee "to conduct this investigation for the purpose of controlling and censoring the motion picture industry and to deny persons engaged in the production of motion pictures the fundamental guarantees of freedom of speech, thus violating the Constitution of the United States and particularly the First Amendment thereof. An examination of the record of this investigation to date discloses that out of a total of 200,000 words of testimony submitted into evidence, 185,000 consisted of hearsay. When there is added to this shocking fact the accumulation of unsubstantiated accusation, slander and vilification, it becomes clear that the right of cross-examination is even more essential in this hearing than in a Congressional inquiry where minimum standards of decent procedure are observed." [Rejected Exhibit 7, J. A. 410.]

Both the motion and application were denied and petitioner Lawson then proceeded to testify.

At the outset of the petitioner's testimony before the Committee, he asked leave, and was denied the opportunity, to read a statement. The Chairman said, "The statement will not be read. I read the first line." [J. A. 188.]

The petitioner protested this refusal and called attention to the fact that executives of motion picture producing companies had been accorded the privilege of reading their statements.

Then the petitioner was asked and answered preliminary, identifying questions. The Committee next asked whether he was a member of the Screen Writers' Guild. The petitioner first objected to the question, urging that the Committee had no power to ask it. He was interrupted numerous times in the course of his reply before he was able to and did say that it was a matter of public record that he was a member of the Guild. The Committee interrogated him concerning his activities as a member and officer of the Screen Writers' Guild. The petitioner answered these questions, protesting them, asserting they violated his constitutional rights, and stating that the information sought was a matter of public record, and that he was a former President of the Guild. Similar questions concerning his screen writing were answered in the same way.

The petitioner was then asked: "Are you now or have you ever been a member of the Communist Party?" Again the petitioner replied by protesting, by saying that the question violated his rights and exceeded the powers of the Committee. He asked that witnesses who had testified concerning him be recalled for cross-examination

so that he could show they had perjured themselves. Members of the Committee and its counsel, Mr. Stripling, repeatedly interrupted the petitioner's reply. The testimony was brought to a close by the Chairman in the following manner:

> "The Chairman: Then you refuse to answer that question; is that correct?
>
> Mr. Lawson: I have told you that I will offer my beliefs, affiliations, and everything else to the American public, and they will know where I stand.
>
> The Chairman (pounding gavel): Excuse the witness . . .
>
> Mr. Lawson: As they do from what I have written.
>
> The Chairman (pounding gavel): Stand away from the stand . . .
>
> Mr. Lawson: I have written Americanism for many years, which you are trying to destroy.
>
> The Chairman: Officers, take this man away from the stand . . ." [J. A. 196-197.]

Petitioner offered and the Court refused to allow proof that when the Committee certified the alleged contempt to Congress it did not submit any part of Lawson's statement which he had offered to the Committee during the hearing, nor was it in any way presented to or considered by Congress before or during the debate on the citation for contempt. Similarly proof was offered and rejected that the defendant's various motions made before the Committee to quash the subpoenas and for the cross-examination of witnesses were not submitted to or considered by Congress either before or during the debate on the citation for contempt [J. A. 301-309].

With this preliminary statement of the Committee hearings and the certification to the House of Representatives as developed at the trial, we now turn to a consideration of the proceedings in the trial court.

Prior to the trial, petitioner filed a Motion to Dismiss the Indictment, which was denied [J. A. 5, 6, 11]. *At the trial,* the following was the only evidence offered by the Government to establish the existence of a competent tribunal at the time that the petitioner testified at the Committee hearings. The Committee had been created and its personnel of eight members designated by virtue of and pursuant to the Legislative Reorganization Act of 1946 [J. A. 174-175, Government's Exhibits 1, 2 and 3, J. A. 379-380]. On the morning of October 27, 1947, the session at which petitioner Lawson was called, three members of the Committee, Congressman Thomas, Chairman, of New Jersey, Congressman Vail of Illinois, and Congressman McDowell of Pennsylvania, were present. The Chairman opened the hearing on that day by saying: "The record will show that a sub-committee is present consisting of Mr. Vail, Mr. McDowell and Mr. Thomas." [J. A. 183.] Over petitioner's objections, the Chairman of the Committee testified that as a matter of law he, as chairman of the Committee, has authority to designate whether a full committee or a sub-committee shall sit, and in the latter event, to appoint the sub-committee; that he had appointed a sub-committee at the outset of the hearing on October 27, 1947, by making the statement in the record to the effect that a sub-committee consisting of himself, Mr. Vail and Mr. McDowell was present [J. A. 183-186, 197-198].

The petitioner served subpoenas *duces tecum* on the Committee calling, among other things, for the records

of the Committee relating to the appointment of or any authority given to appoint a sub-committee to sit in the hearings in Washington in October of 1947. The Government's motions to quash the subpoenas in their entirety were granted, despite petitioner's contention, among other things, that these records would show that the Committee was authorized to conduct the October, 1947, hearings only by and through the full committee [J. A. 318-28, 343-346].

Upon submission of the case to the jury, the judge instructed it that if the Chairman designated a sub-committee on October 27, 1947, the body so designated was a validly constituted sub-committee of the Committee, thereby deciding as a matter of law and without regard to the facts that the Chairman had authority to designate a sub-committee [J. A. 355]. The Court refused to give petitioner's proposed instructions, either that a quorum of the full Committee was necessary in order to constitute a legally competent tribunal, or that a sub-committee could act only if it had been designated by the full Committee or pursuant to its authorization [Petitioner's Proposed Instructions 37 to 48, inclusive, J. A. 372-375].

The trial judge held immaterial and refused to permit evidence in support of petitioner's contentions that the Committee used its powers as an agency of government to establish a blacklist against petitioner and others, to censor motion pictures and to conduct an unlimited investigation into the content of speech and ideas, designed to impede and resulting in the impediment of free speech and association. In support of his contentions the petitioner made a number of offers of proof, after Government objections to appropriate questions had been sustained. All of said offers were rejected. With respect

to blacklisting the petitioner offered to prove the following:

(a) A sub-committee of the Committee, with its chief investigator, Stripling, went to Los Angeles in the Spring of 1947 and there examined a number of motion picture producers, and called upon them to discharge and to suspend certain writers and directors whom the Committee considered to be Communists, among whom was the petitioner, Lawson.

(b) The producers at first rejected the demand of the sub-committee that certain writers be discharged and blacklisted and said that such conduct was unlawful [J. A. 545].

(c) In the Summer of 1947, the Committee sent two of its investigators, Leckie and Smith, to Hollywood, there to call upon the producers, including Louis B. Mayer, executive in charge of production at Metro-Goldwyn-Mayer Studios, and Dore Schary, executive in charge of production at RKO Radio Pictures. These investigators urged the producers "to clean out their houses of certain writers, including petitioner, else there would be trouble in the industry from the House Committee." [J. A. 312-316.]

(d) During the hearings at which petitioner testified all of the members of the Committee and the Committee's chief investigator urged the Motion Picture Producers Association and individual producers to establish a blacklist of persons, including the petitioner, whose alleged views and affiliations were disapproved by the Committee.[2]

---

[2]For example one Committee member stated that the industry should "concern itself with cleaning house in its own industry . . . I don't think you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite Communistic leanings can

(e) In November, 1947, following the close of the Washington hearing, the industry capitulated to the Committee's demand for a blacklist; the petitioner and nine other writers and directors named by the Committee were blacklisted by the industry. Unexpired contracts of other so-called "unfriendly" witnesses were abruptly terminated and further employment in any branch of the industry was denied to all of them, including petitioner [J. A. 263 and 167 F. (2d) 241, 254, note 8].

(f) Thereafter, the Committee in its request for contempt citations claimed "the credit for these discharges and this blacklist."[3]

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be traced." The Committee's counsel joined in the demand that "Communistic influences . . . and I say Communist influences; I am not saying Communists"; be eliminated from the industry by cutting "these people off the payroll" [J. A. 517]. One of the members of the Committee stated the function of the hearing in this way: ". . . of course, we have the problem of eliminating the Communist element from not only the Hollywood scene but also other scenes in America, and we have to have the full support and cooperation of the executives for each of those divisions" [J. A. 518]. At another point, the Chairman of the Committee stated that four of the unfriendly witnesses (the term used by the Committee in referring to petitioners Lawson, Dalton Trumbo, and other writers) before the Committee have been shown to have "extensive Communist and Communist-front records. Yet, this kind of people are writing scripts in the moving picture industry" [J. A. 521]. He then went on to state that that was one of the reasons for the investigation, and that the investigation will be beneficial to the American people and to the industry "because you are the people . . . you persons high up in the industry can do more to clean your own house than can anybody else, but you must have the will power, and we hope that by spotlighting these Communists you will acquire that will" [J. A. 522].

[3] [See Transcript. J. A. 263-4]; Congressional Record, Monday, November 24, 1947, at page 10890, *et seq.*:

> "Congressman Mundt: . . . Then to go on, I want to congratulate the Fox Moving Picture Co., the Twentieth Century-Fox, I believe it is called, which passed a resolution the other day, and I want to read it to you. 'Resolved, that the officers of this corporation be and they are hereby directed, to the extent that the same is lawful, to dispense with the services

With respect to censorship the petitioner offered and the Court refused to permit the following proof:

(a) The Committee utilized its hearings to stop the production of motion pictures, the over-all approach of which did not meet the approval of the Committee members. Included in this category were pictures like "Mission to Moscow," based upon the book of the same title written by former Ambassador Davies [J. A. 489-490] and pictures which depicted Negroes in a favorable light. One of the reasons why the petitioner was called as a witness by the Committee was that he wrote pictures which did so treat Negro characters [J. A. 325-326].

(b) The Committee utilized its hearings and the questions put to petitioner to compel the motion picture industry to make only the kind of pictures the Committee believed should be seen by the American public. Thus for example the chairman asked one witness whether he believed that these public hearings would "aid the industry in giving it the will to make these [anti-Communist] pictures," and the witness replied: "It is my opinion that they will." [J. A. 488.]

(c) The Committee utilized its hearings to establish standards for the content of motion pictures. It called on the motion picture industry to eliminate from pictures

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of any employee who is an acknowledged Communist or of any employee who refuses to answer a question with respect thereto by any committee of the Congress of the United States and is cited for contempt by reason thereof.'

"I congratulate Twentieth Century-Fox on that progressive and patriotic step. I think it is time, and I think it is just a little late, that Hollywood take that action but I congratulate it now because it is highly important that Communists be purged out of the moving picture industry. This desirable objective has been materially aided by the recent hearings in Washington as the general public is becoming rapidly alert to the problem."

anything which the Committee considered Communistic or un-American or subversive propaganda. The Committee chairman and other Congressmen, members of the Committee, recognizing that "it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the government by force or violence," found un-American propaganda in "innuendos and double meanings, and things like that" [J. A. 504], in "slanted lines" [J. A. 505], in "subversion" inserted in the motion pictures "under the proper circumstances, by a look, by an inflection, by a change in the voice." [J. A. 505.] Among the subversive manifestations in motion pictures specified by the Committee were reference to some crooked members of Congress, to dishonest bankers or Senators, to a minister shown as the tool of his richest parishioner, and to presentation of bankers as unsympathetic men [J. A. 506-510].

With respect to his contentions that the Committee used its hearings and powers to conduct an unlimited investigation into the content of speech and ideas designed to impede and resulting in the impediment of free speech and association, the petitioner offered and the Court refused to permit the following proof:

(a) During its entire existence the Committee has considered its authority sufficiently broad in scope to permit investigation and examination of every kind of organization, whether fraternal, social, political, economic, or otherwise, and of every kind of propaganda, including limitless and unrestricted inquiry into any and all ideas, opinions, beliefs, and associations, of any and all individuals and organizations. In determining whether the investigation into the Hollywood motion picture industry

should be made, hearings held, and questions put, the Committee interpreted and applied the resolution and rules under which it acted in accordance with said construction of its powers [J. A. 420; rejected Exhibit 9].

(b) The Committee conducted its Hollywood investigation, determined the pertinency of questions, and otherwise proceeded upon the basis that its authority was established by its own definition and application of the terms "un-American propaganda activity" and "subversive and un-American propaganda that . . . attacked the principles of the form of government as guaranteed by our Constitution." The Committee's concept of what is un-American and subversive runs the whole gamut of what are often denominated progressive ideas in American life, from support of the New Deal to opposition to the Committee on Un-American Activities; from opposition to monoply to defense of sit-down strikes; from advocacy of the Geyer Anti-Poll Tax Bill to opposition to the method of choosing members of the legislature in New Jersey; from supporting, during the war, friendship with "our allies, the Russian people" to the belief that the government of Franco-Spain is not democratic; from a belief in absolute racial and social equality to signing a resolution in opposition to outlawing of the Communist Party; from criticism of Congress to criticism of Chiang-Kai-Shek [rejected Exhibit 9 for identification; J. A. 420-479; 249-253].

(c) Upon the basis of the aforesaid premises as to what constitutes un-American, subversive activity, the Committee has built up files containing names of more than a million individuals and more than a thousand organizations accused of being subversive. It has asserted that it functions as "the Grand Jury of America," as a

"vigilante committee," and that it is a "democratic" substitute for the gestapo [rejected Exhibit 9 for Ident., J. A. 420-479].

(d) Representative Herman E. Eberharter as a member of Congress and a former member of the Committee thoroughly familiar with its activities would state on the basis of his expert knowledge that the Committee had not been engaged in obtaining information for any matter within the scope of any lawful legislative power but that it had engaged in attacking ideas with which it disagreed and which could not be considered subversive by any reasonable standard and that it was a conscious political instrumentality directed against the new deal [J. A. 307-309].

(e) The Hollywood hearings directly impeded the exercise of free speech and association. The effect of these hearings was recognized by a witness called by the Committee, who said he could not answer a question as to whether Communism was increasing or decreasing in Hollywood, because "It is very difficult to say right now, within these last few months, because it has become unpopular and a little risky to say too much. You notice the difference. People who were quite eager to express their thoughts before begin to clam up more than they used to." The effect of the Committee's action was also pointed out by Mr. Eric Johnston, of the Motion Picture Producers' Association, who stated that while Senator Robert Taft need not worry about being called a Communist, not every American was in that position. Charges of this kind can take away everything that a man has—"his livelihood, his reputation, and his personal dignity." [Exhibit 10 for Ident., J. A. 542.]

The petitioner contended that the procedures of the Committee were such as to deny him due process of law.

The trial court held that any evidence on this point was immaterial. The petitioner then offered to prove and the Court rejected proof that during the Hollywood hearings and at all other times the Committee while using its powers to accomplish the unconstitutional objectives set forth above including the destruction of individuals by blacklisting, character assassination and otherwise has consistently denied the basic rights of confrontation and cross-examination of witnesses, effective aid of counsel, the right to produce evidence, and that the Committee at all times has assumed "guilt by association" and unqualifiedly accepted hearsay upon hearsay and unsubstantiated gossip [rejected Exhibits 9 and 10 for Ident., *supra*].

The Government's evidence on pertinence was tried before the judge alone and not before the jury, over petitioner's objection, which was overruled [J. A. 220].

The only evidence to support the claim that the question put to petitioner was pertinent came from Congressman Thomas, who read from the Committee Transcript portions of the testimony given by three witnesses before the Committee during the investigation [J. A. 219-228]. These three witnesses, relied on to establish pertinence, were witnesses as to whom petitioner had in his "Application for Cross-Examination" [rejected Exhibit No. 7] —sought the right of cross-examination. Meaningful efforts to cross-examine Mr. Thomas on the issue of pertinence were disallowed, the Court saying:

> "The Court: Suppose they did not have any testimony. Suppose they decided to investigate the infiltration of Communists in the motion picture industry and they called Mr. Lawson as the first witness and asked him whether or not he was a Communist?
>
> Mr. Margolis: I take the position that they can't

call 140,000,000 Americans to the stand and ask them if they are members of the Communist Party.

The Court: I think I have had enough. I will rule. I will rule that the question is pertinent." [J. A. 242.]

The petitioner claimed that even by the Government's own test the inquiry into the motion picture industry was not pertinent to the subject-matter which the Committee by the terms of Section 121 of the Legislative Reorganization Act of 1946 was authorized to investigate and particularly that the writers' lack of control over the content of motion pictures rendered the questions put to petitioner not pertinent. In this connection the petitioner offered proof which the Court refused to permit that:

(a) There is nothing in American motion pictures generally or in the motion pictures written by petitioner specifically which by any reasonable standard or definition could be considered subversive or which would otherwise justify inquiry by the Committee [J. A. 270-280].[4] "Action on the North Atlantic," as one example of the pictures written by petitioner was classified by the organization as desirable for family or mature audiences and received a

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[4]In addition to producers of long standing and high repute, heads of great studios including the largest studio in the world, prominent writers, story analysts, and drama critics, Richard Griffith, a reviewer, critic and executive director of the National Board of Review, was offered as a witness on this point. Mr. Griffith has reviewed many thousands of films as a critic and on behalf of his organization, whose purpose it is to organize audience support for meritorious pictures. Its seal is placed on approved films. The organization has two to three hundred community councils consisting of representatives of civic, religious, educational and cultural organizations. The governing body is composed of delegates from such organizations as the Boy Scouts of America, the American Bar Association, the Association of American Colleges, the National Association of Better Business Bureaus, the Daughters of the American Revolution, the Y.M.C.A., etc. [J. A. 266-70].

star as a picture especially worth seeing and as one which had done a great service for the American Merchant Marine [J. A. 272].[5]

(b) As a matter of undeviating practice in the motion picture industry it is impossible for any screen writer to put anything into a motion picture to which the executive producers object; the content of motion pictures is controlled exclusively by producers; every word, scene, situation, character, set, costume, as well as the narrative line and the social, political and religious significance of the story are carefully studied, checked, edited and filtered by executive producers and persons acting directly under their supervision; and consequently the content of every motion picture is determined by the producer; all of these facts were matters of common knowledge when petitioner Lawson was subpoenaed by the House Committee.

Petitioner further claimed that the question was not pertinent and was an invasion of his constitutional rights because the Committee did not ask the question in order to get information which it believed it needed. In this connection the Court rejected petitioner's offer of proof that every Congressman before whom Lawson testified on October 27, 1947, and a majority of the members of the whole Committee, and the Committee itself announced in their official statements that they were convinced before Lawson was put on the stand that he was a Communist and that nothing he could have said would change their minds, and that his disavowals would not be believed [J. A. 262-266; rejected Exhibit 11 for Ident., J. A. 546].

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[5]An offer to exhibit each of the motion pictures which Lawson had written to the Court and to the jury was also rejected by the Court.

In addition to rejecting the offers of proof hereinabove referred to, the Court refused to permit or sharply curtailed cross-examination of the principal prosecution witness, Congressman J. Parnell Thomas, on the issues referred to above. Nor was the petitioner allowed to cross-examine the Congressman on the issue of his bias and prejudice as a prosecution witness against the petitioner [J. A. 202-203; J. A. 207; J. A. 214-244]. On the Government's motions the Court quashed *subpoenas duces tecum* directed to the Committee calling for its records relating to the aforesaid issues [J. A. 318-328; J. A. 343-346].

At the close of Government's case, petitioner made a motion for acquittal which was denied [J. A. 300.]

During the course of the argument of defense counsel to the jury, the Court interrupted the argument and stated to the jury that "there is nothing in the record to indicate that he was trying to answer the question. You can refer to the record" [J. A. 348-349], and charged the jury that (a) a non-responsive reply, or (b) a reply that seems unclear to the jury was *per se* conclusive proof of a refusal to answer and that such reply required the jury to return a verdict of guilty as against petitioner [J. A. 358, 359].

All of the petitioner's prayers and requested instructions to the jury were denied by the Court [J. A. 360].

Included in the instructions denied were some to the effect that a failure to answer or a non-responsive answer was not necessarily a refusal to answer [J. A. 377-378].

Prior to and at the outset of the trial, motions to transfer the cause to another district for trial on the ground that juries in the District of Columbia contain many Government employees and their relatives and that it was

impossible to have a fair trial in this particular cause wherein the principal prosecution agency was the House Committee on Un-American Activities, which Committee exercised meaningful control and authority over the jobs and the political views of the Government employees and their near relatives who might be called to sit upon such a jury; the motion to transfer to another district for trial was denied [J. A. 13-25, 57]. Prior to the final selection of the jury, petitioner moved to excuse for cause from the trial jury selected all those jurors who were government employees and government pensioners and their near relatives, and this motion was denied [J. A. 166]; as finally constituted, the trial jury in the case was composed of five persons employed by the Government, one juror who was receiving a pension from the Government, and one juror whose mother was receiving such a pension [J. A. 142, 143, 167]; the petitioner's request for additional peremptory challenges so that he might attempt to get non-government employees into the jury box was likewise denied [J. A. 166].

Immediately prior to the trial a challenge to the array and a motion to dismiss the jury panel was made on the ground that it was selected in a manner neither designed nor calculated to obtain a representative cross-section of the community. In support thereof, petitioner proved that one of the qualifications for jury service in the District of Columbia is an ~~affirmative~~ negative response to the question "Have you any views opposed to the American form of government?" [J. A. 87, 92.] In addition, the jury commissioner examined handwriting on questionnaires returned by talesmen for the alleged purpose of determining the intelligence of the prospective jurors; persons of low income groups with "poor handwriting" were disqualified on the

alleged ground that such poor handwriting disclosed a lack of intelligence in members of such groups. However, those in higher income brackets who likewise had "poor handwriting" were accepted for jury service [J. A. 97]. This motion also was denied [J. A. 29-32, 57-98].

Following the jury's verdict of guilty, petitioner made a motion for a new trial and in arrest of judgment, both of which motions were denied [J. A. 8].

Statement as to Jurisdiction.

The conviction was affirmed by judgment of Court of Appeals on June 13, 1949. The jurisdiction of this Court is based on the Act of June 25, 1948, c. 646 (62 Stats. 869), U. S. C., Title 28, sec. 1254, subsec. 1, which provides that a writ of certiorari may issue to the Court of Appeals of the District of Columbia "after rendition of judgment or decree."

Statutes Involved.

(1) Rev. Stats., Par. 102, as amended by Chap. 594, Act of June 22, 1938, 52 Stat. 942; U. S. C. A., Title 2, Par. 192:

> "Every person who having been summoned as a witness by the authority of either house of Congress to give testimony or to produce papers upon any matter under inquiry before either house or any joint committee established by a joint or concurrent resolution of the two houses of Congress, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

(2) Sec. 121(b), Legislative Reorganization Act of 1946, P. L. 601, Chap. 753, 79 Cong., 2d Sess., 60 Stat. 828, amends Rule XI(1)(2) of Rules of the House of Representatives to provide:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of:

"(i) The extent, character, and objects of Un-American propaganda activities in the United States,

"(ii) the diffusion within the United States of subversive and Un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and

"(iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

(3) Title XI, Section 1417 of the Code for the District of Columbia, relating to qualifications for jurors, provides:

"No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

(4) 49 Stats. at Large 682, Act of Congress of August 22, 1935, Chap. 605, provides:

"All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys of law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of

the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided,* That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law."

Questions Presented.

I.

As a matter of law in a contempt proceeding such as this, is there a conclusive presumption which attends every Congressional investigation that such investigation is lawful, that the Committee had jurisdiction of the subject matter under inquiry, that the Committee acted within the lawful bounds of its power, and that it denied no Constitutional rights or privileges to the witnesses, as was all conclusively presumed by the trial and appellate courts below in the face of petitioner's attempt to prove the contrary in each respect?

II.

May a private individual, called as a witness by the Committee in an investigation into a private industry wherein he is employed, be compelled to disclose his political opinions and associations, particularly where the Com-

mittee's proceedings are used to impose loss of employment and other penalties upon him; or does such compulsion violate Article One, Section Nine, and the First, Fourth, Fifth, Ninth and Tenth Amendments to the Constitution?

III.

Does an investigation in which the Committee uses its powers to censor the content of motion pictures lay outside the lawful bounds of the Committee's power; and may a witness before the Committee be compelled to answer a question which is put as part of the process of censorship, or would such compulsion violate the First Amendment?

IV.

Does an investigation in which the Committee uses its powers to secure the discharge and blacklisting of persons whose alleged ideas and affiliations are deemed "un-American" and "subversive" by the Committee lay outside the lawful bounds of the Committee's power; and may a witness before the Committee be compelled to answer a question which is put as part of the process to secure his discharge and blacklisting, or would such compulsion be a usurpation of power and a violation of the due process clause of the Fifth Amendment?

V.

When a witness before the Committee is being threatened with discharge and blacklisting in and by the Committee's use of its power, is it a denial of due process under the Fifth Amendment to refuse to allow the witness the effective aid of counsel, the right to make a statement and offer evidence in his own behalf, the right to cross-examine witnesses who attack him, and other essentials of a fair hearing?

VI.

Is the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied generally and in the present case by the Committee, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution?

VII.

Did the trial court, by its instructions, refusals to admit evidence and quashing of subpoenas *duces tecum,* commit prejudicial error in taking away from the jury the questions of fact relating to the issue of the existence of a lawfully constituted tribunal and, in effect, determining that issue as a matter of law?

VIII.

Did the trial court commit prejudicial error in instructing the jury that a failure to give a responsive answer or the giving of a reply which is unclear to the jury is *per se* conclusive proof of a refusal to answer, and in commenting to the jury that the petitioner was not trying to answer the question?

IX.

Did the trial court commit prejudicial error in sharply curtailing cross-examination of the only prosecution witness as to some issues and refusing to permit cross-examination at all as to others?

X.

Did the trial court commit prejudicial error by refusing to admit evidence that the Committee, in presenting to the House of Representatives the citation for contempt, did not inform it as to all of the material parts thereof?

XI.

Did the utilization, over the objection of petitioner, of government employees as jurors in this particular case, involving the House Committee on Un-American Activities as the governmental agency directly interested in the prosecution and based upon the charge that petitioner refused to disclose whether or not he was a member of the Communist Party constitutes prejudicial error?

XII.

May the Jury Commission of the District of Columbia validly impose as a requirement for jury service a negative answer to the question, "Do you have any views opposed to the American form of government?"; and did the trial court commit prejudicial error in denying petitioner's challenge and motion to dismiss the jury panel based on the aforesaid requirement?

XIII.

Was petitioner's right to an impartial jury drawn from a cross-section of the community abbrogated by the establishment of qualifications for jury service other than those required by statute and which limited the representative character of the jury; and did the denial of the challenge and motion to dismiss the jury panel based upon the aforesaid grounds constitute prejudicial error?

XIV.

Was petitioner denied a fair trial in violation of the Sixth Amendment by reason of the matters set forth in questions VII to XIII, inclusive.

Reasons for Granting the Writ.

The court below decided important questions of federal law which have not been, but should be, settled by this Court. It decided federal questions in a way in conflict with applicable decisions of this Court. The court below has so far departed from accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the trial court herein as to call for an exercise of this Court's power of supervision.

This is the first of the ten now famous "Hollywood writers" contempt cases. The widely publicized hearings out of which these cases arose were held in Washington, D. C., from October 20-30, 1947, by the House Committee on Un-American Activities. Since then a great debate, international in scope, has arisen over the constitutional questions presented by this case.* These comments have been numerous and highly important.

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*See 46 Mich. L. Rev. 521; 47 Mich. L. Rev. 191; 33 Cornell L. Q. 565; 17 Univ. of Cincinnati L. Rev. 264; 14 Univ. of Chicago L. Rev. 256; 61 Harvard L. Rev. 592 ("Loyalty Tests and Guilt by Association," John Lord O'Brien); 43 Ill. L. Rev. 253; 60 Harvard L. Rev. 1193 ("Report on a Report of the House Committee on Un-American Activities"), Walter Gellhorn; 47 Col. L. Rev. 416; 37 Georgetown L. Journal 104; 1 Baylor L. Rev. 212; 2 Rutgers Q. Law Rev. 125; 27 Neb. L. Rev. 608; 26 Texas L. Rev. 816; 15 Univ. of Chicago L. Rev. 544 ("Letter to President from Yale Law School Faculty"); 34 A. B. A. J. 15; 22 So. Cal. L. Rev. 464.

1. The instant case and its companion, *Trumbo v. United States,* are the first cases to reach this Court which squarely present the issue whether the House Committee on Un-American Activities has the power under our Constitution to summon before it individual Americans and require them to make compulsory disclosure to it of their political affiliations. The determination of this issue is essential, for not only has this agency of government claimed and exercised such power of compulsory disclosure, but the precedent set by the agency of government has sired a host of similar claims to like power throughout the length and breadth of the nation. In the wake of this assertion of official power, governmental agencies of every kind and character, local, state and federal, are presently asserting power, through various devices of compulsory disclosure, to require persons to render unto such bodies an accounting not only of their affiliation or non-affiliation with a given political party, but an accounting as well with respect to the newspapers, books and magazines they read, the causes, beliefs and ideas they embrace, the religion to which they adhere, and the associations into which they have entered whether transient or enduring.*

Standing alone this question presents constitutional problems of great importance the answer to which will have a great impact upon American life. Moreover the problem is so posed in this case that it presents a host of additional constitutional issues.

The court below recognized that the compulsory disclosure demanded by this agency of government invaded

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*The consitutionality of such a broad assertion of power is presently before this court for review in the case of *Parker v. County of Los Angeles,* October Term 1949, No. 49.

the area of opinion, speech and association. However directly contrary to what this Court has held in numerous cases the court below based its opinion on the proposition that the opinion, speech and association fell within the area of governmental power because the ideas involved were extremely important and because the medium of communication—the Motion Picture Industry—was very influential. A statement of the law more directly opposite to the holdings of this Court would be difficult to formulate.

The court below justified its ruling on the premise that ideas themselves may, because of their content, constitute "danger" to the nation against which Congress may protect the people. It held that in probing for ways and means to afford protection against such "dangerous thoughts" Congress may require an individual to disclose his political associations. This concept in its entirety is utterly irreconcilable with the fundamental premise of democracy that the people, not government, shall hear and judge all creeds and ideas.

Moreover, the investigation here by an agency of government into the content of motion pictures and the disclosures of affiliations commanded by the Committee, as part of that investigation, were sustained by the court below without evidence whatever of any reasonable basis for belief by Congress that any given ideas were "dangerous" or that the motion picture industry was in any way furthering any ideas which might, by any reasonable standards, be supposed to be "dangerous." Indeed, the petitioner was denied the right to prove the total absence of any reasonable basis for any such beliefs. If no basis need be laid by government and if a person affected may not even affirmatively disprove the existence of basis,

there is, then, unlimited right on the part of this agency of government to inquire into political beliefs and associations.

No such power has ever before been claimed by any agency of our government. Such assertion of power presents fundamental constitutional issues which this Court should determine.

Furthermore, the Committee used this broad and fearsome power to censor the content of motion pictures and to purge from the motion picture industry alleged "disbelievers" in the "Americanism" to which the members of the Committee subscribed. In so doing it found "heresy" in everything which displeased its members, from alleged membership in the Communist Party to belief that some Congressmen are not altogether honest.

Within the motion picture industry, in the hearings here involved, the Committee as an agency of government used its powers to penalize individuals, including petitioner, because of their alleged beliefs and affiliations. The penalties imposed by such governmental action included blacklisting, character assassination and incitement of public retribution. All this, it did, without any law authorizing the imposition of a penalty, for past conduct and without any of the procedural safeguards which are required for a fair hearing.

But that is not all! The petitioner asked, and was denied the opportunity to establish that this agency of government consistently construed and applied its powers under Public Law 601 as giving it the authority, not alone in the motion picture industry but in every industry, to range the entire area of ideas and association and to ~~determine~~ obtain from every person whether he is or ever was "American" or "un-American." Petitioner was denied oppor-

tunity to show that this Committee repeatedly asserted that it was its function to drive all "un-Americans" out of every phase of American life. Whether or not the power claimed by this agency of government exists in law, this Court has never squarely determined. It now should.

2. In large part the fundamental issues referred to above were not passed upon by the courts below. They ruled and held that there is in a criminal case of this type, a conclusive and irrefutable presumption, which petitioner could offer no proof to overcome, that the investigating committee in fact and in law did have jurisdiction over the subject matter of the inquiry, did not act in excess of the lawful bounds of its power, and did not violate any fundamental rights of the witness; and in addition for all practical purposes the courts below treated the question of pertinence as established by matters of which the Court could take judicial notice without need of proof and without meaningful opportunity of counter-proof.

Contrariwise petitioner submits that it is the function and duty of the judiciary in such a criminal proceeding independently to review the assertion of governmental power by the investigating committee. The law is that a witness may rightfully refuse to answer, (a) where the Committee has no jurisdiction over the subject matter;[1] (b) where the subject matter is not proper for action by

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[1]See *Kilbourne v. Thompson*, 103 U. S. 164; *Matter of Barnes*, 207 N. Y. 108; *Pacific Railroad Commission*, 32 Fed. 241; and *cf.* argument of Senator Bayard in support of the original adoption by Congress of the contempt statute (now 2 U. S. C. 192) set out in *Congressional Globe*, 34 Cong., 3rd Sess. 439, 440, Jan. 23, 1857.

the Committee;[2] (c) where the Committee has acted in excess of the lawful bounds of its power;[3] (d) where the question is not pertinent to some subject matter properly before the Committee;[4] and (e) where the Committee has asserted its power without due regard for the rights of the witness.[5]

While from the nature of the subject matter under investigation *prima facie* presumptions of legitimacy may sometimes arise, the presumption is never a conclusive one.[6] Moreover, no such presumption is permissible within the area embraced by the First Amendment.

Congressional investigating committees can and do assert power over individuals, which power may be effectuated by contempt proceedings utilizing the judicial processes. When the power of the Courts is so invoked, it is inconceivable to deny judicial review of the legislative power asserted. To do so not only refuses the individual

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[2]*Marshall v. Gordon*, 243 U. S. 521; *Greenfield v. Russell*, 292 Ill. 392.

[3]See cases cited *supra; Jones v. S. E. C.*, 298 U. S. 1; *Interstate Commerce v. Brimson*, 154 U. S. 447; *Boyd v. United States*, 116 U. S. 616; *Harriman v. Interstate*, 211 U. S. 407; *Ex Parte Frankfeld*, 32 Fed. Supp. 915; *Hearst v. Black*, 87 F. 2d 68; see Frankfurter, "Hands Off the Investigators," 38 New Republic 329 (1924), and Dimock, "Congressional Investigating Committees," pp. 161, 162, 163.

[4]See cases cited *supra*.

[5]*Sinclair v. U. S.*, 279 U. S. 747; *McGrain v. Daugherty*, 273 U. S. 175, and cases cited [3] above.

[6]For instance, investigations so clearly within the realm of powers delegated by the people to the federal government as (a) investigations of the operations of executive branches of the government (*Sinclair* and *Daugherty* cases, *supra*); (b) investigations into the integrity of the members of the House of Congress (*Chapman's case*, 166 U. S. 661; *U. S. v. Norris*, 300 U. S. 564) and (c) investigations into the lobbying activities of corporations which dealt with or attempted to procure subsidies or other benefits from the federal treasury. *Hearst v. Black, supra.*

affirmative relief against unconstitutional acts by the legislature, but actually sanctions the imposition of punishment through the very judicial body which refuses to consider the constitutional rights of the accused. Judicial review of asserted usurpation or abuse of power by the legislature in committee investigations is no more a stripping of the congressional power to investigate than is the review of the constitutionality of statutes a stripping of congressional power to legislate. To deny such review in a criminal contempt proceeding is to establish as against the private individual that a Congressional investigating committee can do no wrong. Whether or not the judicial review presents delicate or difficult tasks the judiciary may not fail to act for such failure would be unconstitutional abdication of judicial power.

The suggestion that the only remedy for such asserted abuse of power is with the electorate and not the Courts is in vain. No man's constitutional liberties may be made to turn upon the outcome of any election. (*West Virginia v. Barnette,* 319 U. S. 624, 638.) Only this Court can undo the unconstitutional wrong visited upon petitioner.

3. In addition to the great issues of constitutional law involving the Committee's assertion and use of governmental power, this case presents a number of other issues, each of which, it is submitted, is sufficient grounds for the granting of this writ.

This case was decided by the court below before the decision of this Court in *Christoffel v. United States* (No. 528, Oct. Term 1948, decided June 20, 1949). The trial court herein in its instructions and rulings on matters relating to the existence of a legally constituted tribunal took away from the jury the questions of fact with respect thereto, committing error similar to, but more

aggravated than, that which was the sole basis for the reversal in the *Christoffel* case.

With respect to governmental employees on the jury, this case presents essentially the same questions of law which are involved in *United States v. Dennis,* certiorari granted June 27, 1949, No. 436.

This case presents for the first time for the consideration of this Court novel and ingenious devices whereby persons in the District of Columbia who do not accept as fixed and unchangeable in its entirety our present form of government and those in the lower economic categories are discriminated against in the selection of prospective jurors. In the past this Court has used its supervisory powers to prevent abuses of a far less flagrant character in the method of jury selection.

The trial judge in effect instructed the jury that a failure to give a responsive answer or the giving of an unclear answer, was a deliberate and intentional refusal to answer under the contempt statute. He refused to allow or sharply curtailed and cut off cross-examination on matters presented by the government and even on one question asked by the judge himself. He refused to permit the petitioner to prove that in connection with the securing of the citation for contempt against petitioner the Committee did not present all of the facts to Congress.

4. What is most important here, however, is that in the constitutional issues respecting the powers of the Committee "nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful."[7]

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[7]Frankfurter, J., dissenting, *Harris v. United States,* 331 U. S. 145, 173.

This Committee was, by its own solemn declaration, not seeking to get requisite information from the witness which it needed for any legitimate purpose; it was instead "getting" the witness. And with the blessings of the trial court and the appellate court below, it succeeded.

And so this Court need not, out of deference to the customary amenities, sensitively turn away from this sorry spectacle of congressional sinning. The cold record permits no such eye turning. Lawson was called here by this Committee, as it itself openly avows, to become the object of a gladitorial sport at which he would be given his "day in court, so to speak"[8] so that he could be blacklisted, impaled and destroyed in full view of floodlights, motion picture cameras, still cameras, radio recorders, representatives of the world's press, etc., etc. Where the Inquisition once had its rack, the Committee has what its Chairman grimly describes as a "day in court, so to speak." With the passage of the centuries we have thus changed our methods of torture. An advance in culture requires a refinement of methods—and this Committee unconstitutionally supplies it with a "day in court, so to speak."

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[8]J. A. 546; defendants rejected Exhibit 11: "Chairman Thomas: During the second week we subpoened before us those who had been accused of being Communists or having engaged in Communist activities. They were subpoened because our investigation had disclosed that they were Communists or had long records of Communist affiliations and activities. * * * We also wanted these witnesses to have *their day in court, so to speak, to answer, if they could, the allegations which had been made against them.* * * * The reason these 10 individuals refused to answer the question was because they were Communists. They knew that we had the evidence that they were Communists, and they knew we were in a position to expose their Communist activities, which they had been engaged in over a period of years." (Emphasis supplied).

I.

The Committee's Utilization of Congressional Power, as an Agency of Government, to Compel Disclosure of Private Political Opinion and Association Is Forbidden: (a) by the First, Fourth and Fifth Amendments as Unwarranted Invasion Into the Private Rights of Individuals, and (b) by the Ninth and Tenth Amendments as Unwarranted Invasion Into the Area of Governmental Powers Reserved Exclusively to the Sovereign People.

It is petitioner's position that no power exists in Congress to compel a private citizen to answer, under compulsion of contempt, the question: "Are you now or have you ever been a member of the Communist Party?" This is so because of the confluence of principles hammered out by our history and conjoined as integral parts of the Bill of Rights.

A. The Committee's Utilization of Congressional Power, as an Agency of Government, to Compel Disclosure of Private Political Opinion and Association is Forbidden by the First, Fourth and Fifth Amendments as Unwarranted Invasion Into the Private Rights of Individuals.

When in the context of this investigation, the Committee sought to compel the petitioner to reveal his political beliefs and associations it was utilizing official power:

(1) contrary to the Fifth Amendment to revive the oath *ex officio;* and

(2) contrary to the First, Fourth and Fifth Amendments to carry on a forbidden search into belief and association.

(1) The Oath Ex Officio.

When the Committee sought to compel the petitioner to reveal his political beliefs and associations, it was attempting to revive the use of the oath *ex officio,* outlawed over 300 years. In this case the Committee has declared that Communism is political heresy. Like the Inquisition, this Committee effectuates its objective of stamping out "heresy" by the use of *ex officio* procedures.

The oath *ex officio* was originally conceived by the ecclesiastical authorities as an instrument to eradicate heresy. It was a method whereby the suspected heretic was put upon his oath and then compelled to answer questions touching upon his faith. Those who refused to answer were punished. The Inquisition[1] owed its effectiveness largely to the adoption of this method. (See Wigmore, 15 Harvard L. Rev. 615.)

Although, upon the Continent, the oath *ex officio* was received uncritically, its reception in England was much less favorable. In that island there already existed a deep-seated aversion to compulsory disclosures. In 890 A. D., Alfred the Great had hanged a justice of the peace "because he judged Olding to death for not answering." ("Mirrour of Justices," Horne (Washington 1903), Sec. 108 (p. 245), Subsec. 10 (p. 246).)

The Court of High Commission in Causes Ecclesiastical was set up in 1558 by Elizabeth, as head of the Church, and in 1583, under the leadership of Archbishop Whit-

[1]"The duty of the inquisitor, moreover, was distinguished from that of the ordinary judge by the fact that the task assigned to him was the impossible one of ascertaining the secret thoughts of the prisoner. * * * The crime he sought to suppress by punishment was purely a mental one." (Lea, "History of the Inquisition," p. 400, 405).

gift, the court started a crusade against heresy, effectuated by the examination of suspected persons under the oath *ex officio*. However, these efforts met the resistance of the common law lawyers led by Sir Edward Coke, who granted prohibition against the use of the *ex officio* process by the High Court of Ecclesiastical Causes, declaring:

> "And so long as a man doth not offend neither in act nor in word any law established, there is no reason that he should be examined upon his thought or cogitation; for it hath been said in the proverb, thought is free; * * *." (*Edward's* case, 13 Co. Rep. 9, 77 Eng. Rep. 1421.)[2]

In 1637 the Court of the Star Chamber examined John Lilburn, "Freeborn John," an opponent of the Stuarts, on a charge of printing or importing certain heretical and seditious books. Lilburn refused to answer questions. The Council of the Star Chamber condemned him to be whipped and pilloried for his "boldness in refusing to take a legal oath," without which many offenses might go "undiscovered and unpunished." (See 3 How. State Trials 1315, *et seq.*)

Lilburn was whipped, but the popular indignation that followed led to the downfall of the Court of the Star Chamber. In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter administer an *ex officio* oath.

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[2]See Maguire, "Attack of the Common Lawyers on the Oath Ex Officio," in Essays in History and Political Theory, Harvard (1936) p. 199.

The *ex officio* oath had been the most hated instrument employed to create the unhappy plight of the Puritans and Separatists. In 1637, Charles I had directed the High Commission that if these dissenters refused to take the oath they were to be "held and had as confessed and convicted legally." As R. Carter Pittman said in 21 Virginia Law Review 763, 771, "What more than this would be calculated to drive the Puritans and Separatists into either New England or insanity."

One of the grievances leading to the American Revolution was the Crown's extension to the colonies of the Vice-Admiralty jurisdiction together with its inquisitorial methods. The colonists "saw in the trials before prerogative judges without juries a threatened deprivation of all their rights as Englishmen among which was the right not to be dragged into an 'Inquisitional Court' for examination." (Pittman, *supra,* p. 787.)

While in England the oath *ex officio* was used to ferret out political and religious dissent, the hated procedure was applied to all crime on the Continent. The framers of the Bill of Rights feared that the new Federal Government might import into our system of law the inquisitorial procedures known to the civil law on the Continent.

The danger of direct self-incrimination, as we know it today, did not exist in 1787, because at that time and for nearly ninety years thereafter, the accused was not permitted to testify in his own trial even if he wanted to. (*Wilson v. U. S.*, 149 U. S. 60.) It was the inquisitorial method and the oath *ex officio* that Patrick Henry sought to prohibit when he urged the adoption of the Fifth Amendment. (III *Elliott's* Debates, pp. 445-449.)

This Court has said in respect to criminal cases:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end." (*Watts v. Indiana*, No. 610, Oct. Term, 1948.)

Certainly the same prohibition against the inquisitorial method applies to those who are suspect of political dissent.

Since the demise of the oath *ex officio*, those who would compel the disclosure of beliefs and associations turned to the "test oath."[3] Since a refusal to answer under the test oath requirement did not mean imprisonment but only the deprivation of the right to vote or to follow a calling, it was claimed to be lawful.

But this specious argument[4] has never been adopted by American courts despite the many attempts to revive the test oath practice.

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[3]Carl Joachim Fredrich "Teacher's Oaths" (1936) 172 *Harper's* 171.

[4]Following the decision in *Cummings v. Missouri*, 71 U. S. 277, see Argument of Charles C. Whittelsey, counsel, reported in the *Murphy and Glover Test Oath Cases* (1867) 41 Mo. 340 at 360; "Not one of the oaths prescribed by the English statutes, that I have read, required the citizen to swear that he had never committed a crime or expressed a sympathy with rebellion—not one required that the officer or the citizen should purge himself of offense, and bear testimony against himself. That is a discovery reserved for our times and our country and a great invention it is. 'Go to,' said the Quaker to poor Tray, 'I will not kill thee, but I will give thee a bad name,' as he turned him into the streets with the cry of 'mad dog.' and somebody else did kill Tray, and so do the provisions of this new Constitution say: We will not punish treason against the United States or this State, or any other offence mentioned in this long catalogue, but unless thou canst or wilt swear

But the danger has always lurked in the background (Reppy "The Specter of Attainder in New York, 23 St. John's Law Review 1-67, 243-290).

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that thou has done none of these acts, we will deprive thee of thy means of living, and thy places of honor and profit held by thee of the gift of private individuals—thou shall not serve at the law, nor receive the profits of its profession—thou shall not minister at the altar of God, nor receive a salary from those worshipping thereat—thou shall not teach the young mind the truth, nor receive pay therefor—thou shall not direct the business of any private corporation, although its wealth be all thine own. We will not punish thee—we are merciful! But go—we proclaim thee an outlaw, disabled from following thy past calling—we forbid thee earth, fire and water, and commend thee to the charity of some other country in which we wish thee all success. * * * It is indeed an ingenious punishment; it dispenses with statutes defining offences and providing penalties therefore; it dispenses with courts, with all their paraphernalia of indictments by grand juries and trial by petit juries, executing the law upon offenders; all that is needed, is, that a law be passed every year or two requiring every citizen to swear that he has never wronged or defrauded any one; that he has never slandered his neighbor; that he has never committed murder, burglary, larceny, adultery or fornication; and if he cannot thus swear, then forbid him to follow any profession, trade or calling, for that will not be a punishment inflicted upon him, but a mere regulation of the trades, callings and professions in the State; and to provide such regulation, the State has a most perfect right; nay, more, it may prohibit them all to non-jurors, and still violate no provisions of the Constitution of the United States, nor take away any inalienable right of the citizen. * * * As the penalty does not reach to tangible property, nor actually touch the body, it is to be held no punishment, but a mere regulation of the business affairs of the people. Sirs! 'You take my life when you do take the means whereby I live.' *'Requiscat in pace'* was the parting benediction bestowed by the Inquisitors as they turned away from the brother whom they walled up alive in his death-cell. 'Go in peace' is the blessing bestowed upon those who may not swear by all the words of this new evangel of liberty."

Despite the Constitutional protection against inquisitorial procedures[5] there have been attempts, particularly in times of postwar hysteria, to impose penalties of various sorts upon individuals who refused to disclose their past opinions and beliefs. In 1803 the Pennsylvania Tories were the target (*Respublica v. Gill,* 3 Yates 429, discussed at 161 U. S. 633). Defeated partisans of the South retained their right to pursue their callings only by the action of this Court in *Cummings v. Missouri,* 71 U. S. 277. Contemporary discussion of this opinion had much of the intemperate quality of some expressions of our own times (Swisher, "Stephen J. Field, Craftsman of the Law," (Wash. 1930) p. 152), but the case became a landmark of American liberty.

The idea dies hard. Only last year District Judge J. Waties Waring in *Brown v. Baskin,* 78 Fed. Supp. 933, had to enjoin a test oath required of voters in the South Carolina Democratic Primary to "solemnly swear" that they believed in and would support "the social and educational separation of races" and that they were "opposed to the proposed Federal so-called FEPC law."

Since the road of the test oath has been so effectively blocked by this Court, the Committee here has reverted to the oath *ex officio* in order to compel the petitioner to reveal his political beliefs and associations. This Court

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[5]"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious *test oath* or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." (Emphasis supplied). (*Bridges v. California* (1941), 314 U. S. 252 at 265).

must thwart *in limine* the revival of this mediaeval procedure.[6]

(2) The Right of the Individual to Be Let Alone With Respect to His Beliefs and Associations.

In every organized society in history, the individual has sought to establish for himself some areas of his life in which he had the right to say to his government, "So far and no further." The right, as against one's government, to be let alone is indeed a precious one.

In no organized society, however, is it possible for the individual to be completely free from governmental interference in his private life. It is possible, however, to establish areas in which the individual is entitled to a right of privacy—the right to be free from governmental meddling. Drawing upon the history of the 17th Century, the Bill of Rights was intended in part to delineate these areas.

The first ten amendments must be considered as an integrated design establishing the relation of the individual to his government in a free society. The very essence of this joint purpose is to protect the individual against the use of government power to invade "his indefeasible right of personal security, personal liberty and private property." (*Boyd v. U. S.*, 116 U. S. 616, 630.)

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[6]In fact the committee's practices suggest a revival of another medieval procedure—the *peine forte et dure*—4 Blackstone 325-327. Compare: "Congressmen Mundt: Why did they refuse to answer? Because if they said 'No' the laws of perjury are too rough, and the sentences they would have received would be greater than if they simply maintained silence and were cited for contempt. If they admitted the truth and said, 'Yes,' then, of course, they knew they would lose the lucrative jobs they had been holding out in Hollywood." (J. A. 547).

This Court has read the Fourth and Fifth Amendments together so that the search permitted by the former may not be used to obtain the self-incriminating evidence prohibited by the latter. So, too, when the First, Fourth and Fifth Amendments are considered jointly, and particularly in their historical context, they spell out the right of the individual to be let alone with respect to his beliefs and associations. This right means that the individual may speak or keep silent as he chooses. The government may neither abridge his right to speak nor compel him to disclose the beliefs which he prefers to keep to himself.

The sanctity of a man's home, protected by the Fourth Amendment, is extended to the realm of his mind by the First Amendment. The First Amendment having carved out a domain belonging to the individual, upon which the government may not trespass, the concepts underlying the Fourth Amendment prohibit the government from exercising its powers of search therein. It matters not whether the search be by the rumaging of a man's papers or the conducting of an inquisition with respect to the contents of his mind not yet ~~been~~ put down on paper.

The Fifth Amendment reinforces this right to be let alone; for to compel a man to disclose his beliefs and affiliations, at a time when such disclosure may subject him to penalty of social sanctions, violates at least the principles and purposes underlying that Amendment.

Together, the First, Fourth and Fifth Amendments prohibit the government from prying into or otherwise interfering with the individual's beliefs and associations. And it is well that they do, for there can be no true freedom of belief and association unless the individual is allowed to choose his own time and place to disclose them.

As Mr. Justice Brandeis said, dissenting, in *Olmstead v. U. S.*, 277 U. S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Even if the investigation here involved matters not within the realm of the mind, it would hardly be contended that the power to inquire was an unlimited one. At the very least that power would be confined to necessity and would be subject to the requirement of reasonableness, as are search warrants and subpoena *duces tecum* under the Fourth Amendment.

The power of the legislature to investigate is based upon the legislature's need for information in order to enable it to act wisely and effectively in determining what legislation it should adopt. Such need arises only "where the legislative body does not itself possess the requisite information." (*McGrain v. Daugherty*, 273 U. S. 175; *People v. Barnes*, 204 N. Y. at 125; *Ex Parte Hague*, 150 Atl. 322; *People v. Webb*, 5 N. Y. Supp. 855.) Even where it inquires into matters not within the scope of the First Amendment, Congress may not demand information concerning the private affairs of a citizen, unless it is seeking and does not have information required in connection with the consideration of legislation or the need therefor.

Here the record demonstrates that this minimal test has not been met. For here every single Congressman before whom petitioner testified on October 27, 1947, as petitioner offered to prove, had publicly announced that it already possessed the very information sought to be elicited from the petitioner. Indeed, every single one of the Congressmen before whom petitioner testified on October 27, 1947, declared further:

1. That it would not believe any disavowal of Communist Party membership made by petitioner under oath; and

2. That it considered, for its purposes, that the very failure of petitioner to answer the question was proof of the fact of membership, already satisfactorily known to it.[7]

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[7]Defendant's Rejected Exhibit No. 11. [J. A. 546, 547].

"1. Mr. Thomas (Cong. Rec. Nov. 24, 1947, page 10880): 'During the second week we subpoened before us those who had been accused of being Communists or having engaged in Communist activities. They were subpoened because our investigation had disclosed that they were Communists or had long records of Communist affiliations and activities. * * * *We also wanted these witnesses to have their day in court, so to speak, to answer if they could, the allegations which had been made against them.* * * * The reason these 10 individuals refused to answer the question was because they were Communists. *They knew that we had the evidence that they were Communists, and they knew we were in a position to expose their Communist activities, which they had been engaged in over a period of years.*

" 'After every one of these witnesses left the witness stand the committee staff immediately placed into the record their Communist Party registration card, along with complete reports of their extensive Communist activities.

" 'Before I proceed any further, I should like to make this point clear. These 10 individuals were not chosen at random and brought in and asked, as they would have you believe, "what is your political affiliations?" They were brought in, as I have previously stated, because of the overwhelming evidence which was before the committee that they were

Where, the Committee, as here, was not seeking information, the right of privacy protects a witness even against disclosure of any of his private papers or activities. When a government agency in addition asserted the power to delve into matters of opinion, it sought to turn back and destroy the pages of history in man's struggle for individual freedom.

The right to keep one's silence is ancient. It was known in Athens and Rome (*Coffin v. U. S.*, 156 U. S.

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identified and active in a subversive and foreign-directed conspiracy which goes under the misnomer of the Communist Party of the United States.'

"2. Congressman Vail (Cong. Rec. Nov. 24, 1947, page 10881):

" 'All through their brazen performance it was also clear that the conduct of each of those 10 witnesses was in full accord with standard Communist practice long established to which all of them obediently conformed. In other words, these men showed a slavish subservience to the instructions of those representing a foreign power and utter and calculated defiance of a committee of the duly elected Congress of the United States. To indicate that the conduct of these witnesses was not the brilliant inspiration of any single individual witness or the result of a remarkable meeting of minds of all of them, I wish to cite the rules of conduct laid down for all Communists by their leading spokesmen.'

"3. Congressman McDowell (Cong. Rec. Nov. 24, 1947, page 10886):

" 'The ten witnesses who are all known to be veteran members of the Communist Party, which, the committee holds, as does most of you, to be not a political party, not a political ideology, nor a political philosophy, but an international political conspiracy, directed by an iron and militant hand in the capital of Soviet-Russia—Moscow.'

"4. Congressman Mundt (Cong. Rec. Nov. 24, 1947, p. 10891):

" '*Why did they refuse to answer? Because if they said "No," the laws of perjury are too rough, and the sentences they would have received would be greater than if they simply maintained silence and were cited for contempt. If they admitted the truth and said, "Yes," then, of course, they knew they would lose the lucrative jobs they had been holding out in Hollywood.*' " (Emphasis added).

432). It was relied upon by Jesus Christ in his trial (Matthew, 26:33).

General searches had originated in the Star Chamber (*Boyd v. U. S.,* 116 U. S. 616, 628) and they, along with compulsory self-accusation and inquisitorial investigations, "were among those intolerable abuses of the Star Chamber which brought that institution to an end at the hands of the Long Parliament in 1640." (*Jones v. S. E. C.,* 298 U. S. 1, 28.)

The inviolability of political opinion and its counterpart, political association, from Congressional search, was known and respected by Congress until the House Committee on Un-American Activities departed from this respected principle.

For example, in 1835, Thaddeus Stevens, then chairman of a committee of the Pennsylvania State Legislature to investigate the Masonic Order, issued subpoenas directed to prominent Masons, among them a minister, Rev. Dr. Sproal (Woodley, T. F., Thaddeus Stevens (Pennsylvania 1934)). Dr. Sproal, when called, refused to take the oath "on the grounds that it would wound his conscience as a Christian" and violate "his Constitutional rights as a man."

Stevens applied to the House to hold the witness for contempt. Although his party, together with the Whigs, enjoyed a majority in the House, the legislature refused and he was discharged (Woodley, *supra,* p. 29).

The following year Stevens was similarly rebuffed by William H. Harrison, later President, when he asked the latter's assistance in suppressing the Masons. Harrison replied that "he was certain that there exists no such power, either in the whole Government of the United

States or in any of its Departments, and that the attempt to exercise it would constitute a usurpation of power, pregnant, if tolerated by the people, with mischiefs infinitely more fatal than those which it was intended to remedy." (Woodley, *supra*, p. 38.)

On a number of occasions, the House of Representatives in contested election cases has had before it the problem of determining how a citizen voted. In these cases, of course, the issue was clearly presented: Has the legislature the power to compel a citizen to disclose his vote? Has it the power to compel him to disclose his political affiliation? The answer has been uniformly in the negative. From the numerous precedents, the following is one which enumerates in detail the reasons for the position uniformly taken by the House:

> "Where, as in New Jersey, the law allows of voting by ballot, thus intending to enable the elector to withhold the knowledge of his choice from all, *that law cannot so run counter to its own spirit as to compel him, on some other occasion, to unfold the secret.* Hence, the necessity of resorting to a grade of evidence, less direct, but which may be, and often is, no less certain than the oath of the voter. This position is supported by the decision in the election case from New Jersey, in this House, which was determined in 1840. In that case, the majority of the Committee on Elections * * * laid down the following rule as their guide. 'Although in numerous instances the voter, being examined as a witness, voluntarily disclosed the character of his vote, *yet in many cases he did not appear, or appearing chose to avail himself of his legal right to refuse an answer on that point.* In such cases, proof of general reputation as to the political character of the voter, and as to

the party to which he belonged at the time of the election, has been sufficiently demonstrative of the complexion of his vote." (Emphasis supplied.) (Representative Jenkins, *Congressional Globe*, 29th Cong., 1st Sess. 1845-46, App., p. 455.)

Recently there has been a growing awareness of this right. In Nutting, "Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs, 47 Michigan Law Review 181, at 221," it is said:

"Turning to the area of belief or opinion as distinct from action, it should be concluded that the former matters are privileged against compulsory disclosure. In many circumstances it may be desirable for a legislative body to determine who a man is and what he does or has done. But unless he translates his beliefs into action, what he thinks should not concern the government. 'The Devil himself knoweth not the mind of man' and Congress should not attempt to out-do his Satanic Majesty. It is impossible to demonstrate a relation substantial enough to prevail against the individual's desire for silence, between the public interest in disclosure and privately held views as to the form and function of government. For a court to allow the government to compel such disclosures would indeed amount to judicial approval of thought control."[8]

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[8]"The essence of our political theory," writes Mr. E. B. White (New York Herald-Tribune, December 2, 1947) "in this country is that a man's conscience shall be a private, not a public affair, and that only his deeds and words shall be open to survey, to censure and punishment. The idea is a decent one, and it works. It is an idea that cannot safely be compromised with, lest it be utterly destroyed. It cannot be modified even under circumstances where, for security reasons, the temptation to modify it is great * * *. One need only watch totalitarians at work to see that once men gain power over other men's minds, that power is never used sparingly and

B. The Committee's Utilization of Congressional Power, as an Agency of Government to Compel Disclosure of Private Political Opinion and Association, Is Forbidden by the Ninth and Tenth Amendments as an Unwarranted Invasion Into the Area of Governmental Power Reserved Exclusively to the Sovereign People.

1. PETITIONER'S POSITION.

While the liberties of speech, thought and association[9] possess, of course, great value to the individual, the more fundamental constitutional significance attending those liberties is a societal one; they bear for the nation at large a value which is beyond all measure and which is derived directly from the function which they perform in the processes of a self-governing society. In our way of life the people play a role, and, indeed, the greatest role of

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wisely, but lavishly and brutally and with unspeakable results. If I must declare today that I am not a Communist, tomorrow I shall have to testify that I am not a Unitarian. And the day after, that I have never belonged to a dahlia club. It is not a crime to believe anything at all in America."

[9]Affiliation, at least insofar as it is concerned with the holding and advocacy of doctrines, is but an inseparable corollary to a man's right to freedom of speech and thought. Assembly, association and affiliation, being but the means whereby in a complex society an individual today may render his right to freedom of speech and thought meaningful, are as fully protected by the Constitution as is speech itself. (*Thomas v. Collins*, 323 U. S. 516, 530; *De Jonge v. Oregon*, 299 U. S. 353; *Bowe v. Commonwealth*, 320 Mass. 230, 252; de Tocqueville, *Democracy in America*, (N. Y. 1946), Vol. I, p. 196; Laski, *Freedom of Association*, VI Encyc. Soc. Sci., p. 449).

The Communist Party being a political association, affiliation with that Party is in effect but an expression of the individual's right to think and speak freely in the political arena, and for those choosing so to do the right to affiliate with that Party or to espouse the ideas embodied in its program and platform is as immune from accounting to governmental authority as the right of other persons to affiliate with more popular causes or advocate more generally accepted views. (*Bridges v. Wixen*, 326 U. S. 135, *Schneiderman v. United States*, 320 U. S. 118). The view that ideas "Communis-

all, in their own government, and they do so through the liberties of the First Amendment.

The nation's Constitution was not ordained and established by the states, "but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'" (*Martin v. Hunter's Lessee,* 1 Wheat. 304, 324.) In adopting the Constitution, the people granted certain powers to the federal government and certain others to the state governments, but beyond doing this, they reserved to themselves "those sovereign authorities which they . . . [chose] . . . not to delegate to either." (*Martin v. Hunter's Lessee, supra,* p. 325.) So doing they made this nation "emphatically, and truly, a government of the people." (*McCulloch v. Maryland,* 4 Wheat. 316, 405. They made all government answerable in the ultimate to them for every deed undertaken and every policy established. (*Yick Wo v. Hopkins,* 118 U. S. 356, 370; *Newport Bridge Co. v. United States,* 105 U. S. 470, 482.)

At the very foundation of self-government by the people must be unfettered freedom of speech, thought and asso-

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tic" in character are protected by the First Amendment (as affiliation therefore must be) was expressed by Mr. Justice Holmes in his now famous dissent in *Gitlow v. New York,* 268 U. S. 652, 673, when he said:

> " . . . if, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have they way."

Brandeis, J., similarly expressed himself in his concurring opinion in *Whitney v. California,* 274 U. S. 357, 379. The views expressed in these opinions have many times been adopted by majority decisions of this court. (*Bridges v. California,* 314 U. S. 252, 262-263; *Schneiderman v. United States,* 320 U. S. 118, 137; *Thomas v. Collins,* 323 U. S. 516, 537; see also *De Jonge v. Oregon,* 299 U. S. 353; *Herndon v. Lowry,* 301 U. S. 242; *Cantwell v. Connecticut,* 310 U. S. 296.

ciation within the area of matters of public moment. Free exercise by the people of these liberties is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of . . . society." (*Thornhill v. Alabama,* 310 U. S. 88, 103.)

For the Committee here to assert authority to hold the people by and through compulsory disclosures accountable to it with respect to their thought, speech and associations fundamentally misapprehends the relation of people to their representatives in our nation. It is public officials who are accountable to the people for the ability and faithfulness with which they carry out the people's will, not the people who are accountable for their opinions, thoughts and desires to the holders of office.

It is, therefore, improper, as a matter of principle alone, for this Committee or any other governmental body to seek to compel, by compulsory disclosure or otherwise, submission to it of the thoughts, speech and associations of the people. (*Thomas v. Collins,* 323 U. S. 415, 539, *et seq.*)

Such submission could not be justified even though the burden placed on these freedoms were slight, for no restraint there can ever be deemed small when it is remembered what is restrained. (*Thomas v. Collins, supra,* p. 543; *Murdock v. Pennsylvania,* 319 U. S. 105, 108; *Jones v. Opelika,* 319 U. S. 103.) Even the possibility of injury to freedom of speech, thought or association is a risk with which the nation cannot gamble. This, because more important by far than the adoption of any single law or of policy, however imperative it may appear to be, is the preservation in full working order of the "processes of popular government" (*Thornhill v. Alabama,* 310 U. S. 88, 103), whereby the people may apprehend

and correct such errors of state as must inevitably occur. Freedom of speech, thought and association make up the operative machinery of those processes; all else in law and government is but the products which those processes create, recreate, alter, modify or abolish as the people will. Preserve the processes of self-government and the remedy exists to repair damage to end products, but impair the processes themselves and the entire cycle is stilled and democratic government is ended.

Even those justices who have disputed the outer reaches of the foregoing principles, have never questioned the narrower proposition that at least where burden in fact is imposed by government action the state action must be stricken down. (See dissenting opinions: *Murdock v. Pennsylvania,* 319 U. S. 105, 117, 118, 130, 134, 139. See also: *Grosjean v. American Press,* 297 U. S. 233; *Bridges v. California,* 314 U. S. 252, 268, 569.) And burden there is *in fact* in the instant case—burden most severe in manner and degree. Compulsory disclosure was used by the Committee here to expose and stigmatize the adherents of minority ideas and thus to invite—indeed, incite—ruthless economic, social and other retaliation against them. Such use of governmental power obliterates the ideas attacked and drives them and their adherents from the marketplace of thought.[10]

Even this does not exhaust the vice of the use of governmental power by this Committee to interfere with thought, speech and association. For here there is not merely interference attended by heavy burden but interference calculated and intended to *coerce* the people in their choice of

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[10]This in the teeth of this court's command that "no State, nor all together, nor the nation itself" can "impede" freedom of speech and association. *Thomas v. Collins,* 323 U. S. 516, 543.

ideas and their speech and association in furtherance thereof. The Committee's demand for compulsory disclosure places no general or random burden upon speech and thought, retarding the discussion and evaluation of all ideas equally and alike but rather a *selective* burden falling only upon some ideas and calculated to intimidate the people with respect to those ideas. The Committee's action was thus calculated to coerce the people to speak and think, not according to their honest individual judgment and conscience, but according to their judgment and conscience as modified by fear. This is the final subversion of self-government. Coerced people no more rule themselves than do people in overt bondage. The framers of our Constitution "set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*West Virginia v. Barnette,* 319 U. S. 624, 641.)

2. The Opinion Below.

In upholding the compulsory disclosures required by the Committee in the instant case, the Court of Appeals fully perceived that the central issue was the intrusion of government into the area of thought, speech and association. It sustained this intrusion on the ground that the thought, speech and association so burdened and abridged were important:

> ". . . No one can doubt in these chaotic times that the destiny of all nations hangs in balance in the current *ideological* struggle between communistic-thinking and democratic-thinking peoples of the world. Neither Congress nor any court is required

> to disregard the impact of world events, however impartially or dispassionately they view them. It is equally beyond dispute that the motion picture industry plays a critically prominent role in the *molding of public opinion* and that motion pictures are, or are capable of being, *a potent medium of propaganda dissemination which may influence the minds* of millions of American people. This being so, it is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions." (Emphasis added.) *(Lawson v. U. S.*—No. 9871 U. S. C. A.—D. C.)

This is complete approval, by the court below, of governmental preemption of the marketplace of public opinion. Petitioner's freedom of thought, speech and association, the lower court says, may be abridged—indeed, destroyed—because motion pictures are a potent medium for the dissemination of ideas reaching and influencing "the minds of millions of American people" and because the questions propounded by the Committee respecting Communist Party affiliation were "pertinent" to an "ideological struggle" so grave in importance and significance that "the destiny of all nations hangs in balance." Thus, the opinion holds, speech may be abridged whenever it relates to a vital subject matter or is expressed through an effective means of communication. The amendment is to be preserved only for unimportant speech ineffectively communicated.

This court's statement quoted below from *Bridges v. California,* 314 U. S. 252, 269, was written for this very case:

> ". . . It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.
>
> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

The court below openly expresses fear lest the people be induced—not by force, fear and compulsion, but through the free competition of ideas in what it, itself, designates as an "ideological struggle"—to favor one set of doctrines over another. Thus does that court abandon the root premise of democracy—faith in the judgment of the people as to the worth of all ideas whatever. Now an *idea* in and of itself becomes a *danger* demanding state suppression.

Under our Constitution no mere idea can be a danger. The "present danger" test has never referred to the "danger" of an idea. It has meant danger of *conduct,* of "substantive evil" against which Congress has a right to protect the nation. Congress has no right to protect the nation from an idea.

> ". . . it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine." *(Thomas v. Collins,* 323 U. S. 516, 545, Jackson, J., concurring.)

Additionally, laying the First Amendment entirely aside, the court below has upheld compulsory disclosure in the instant case upon a record which could not justify com-

pulsory disclosure even respecting personal affairs having nothing to do with freedom of speech, thought and association. Whatever the subject matter, Congress possesses no "general power of making inquiry into the private affairs of the citizen." *(Kilbourne v. Thompson,* 103 U. S. 168, 190.) Congress may not rummage at random through the papers, records or affairs of any person, firm or corporation merely "in the hope that something will turn up." *(F. T. C. v. American Tobacco Co.,* 264 U. S. 298, 306, quoted with approval in *Sinclair v. United States,* 279 U. S. 263, 294.) All persons as to all affairs have "the right to be exempt from . . . unauthorized, arbitrary or unreasonable inquiries and disclosures." *(Sinclair v. United States,* 279 U. S. 263, 292.)

Hence, even were the First Amendment not involved in the instant case, before Congress might investigate the personal affairs of petitioner, or any other member of the motion picture industry, respecting his or their participation in the production of pictures, reasonable basis and foundation for such investigation would first have to be established. The Frst Amendment aside, before Congress in the name of exploring the propagation of "dangerous ideas" could investigate any communication industry and, as part of such investigation compel any or all of the persons engaged therein to disclose their thoughts or affiliations, there would initially have to be shown some reasonable basis therefor. Here that means a reasonable basis for believing, first, that the ideas with which the investigation was concerned were "dangerous," and,

second, that the industry involved was in some manner furthering the propagation of such "dangerous ideas."

No such foundation existed in the instant case. In the first place there is no evidence in the record establishing the "danger" of any idea, however "danger" be defined. To the extent that the court below discovered any material supposedly bearing on the issue, it was not material extracted from any part of the record here, but consisted solely of matter judicially noted by another division of the court below in *Barsky v. United States,* 167 F. 2d 241, 247. The material related to the supposed "danger" of the precepts and program of the Communist Party in the United States and throughout the world. Yet this court has definitely held that judicial notice is unavailing to establish what ideas and precepts are in fact embraced by any political party—including particularly, the Communist Party of the United States, or any officer, member or supporter of that party—let alone to establish the "danger" of whatever ideas might in fact be so embraced. (*Schneiderman v. U. S.,* 320 U. S. 118; *Bridges v. Wixon,* 326 U. S. 135.)

Second, even could judicial notice supply proof that certain specific ideas, however expressed or defined, were in fact invested with "danger," still here, there is a lack of reasonable basis for the investigation undertaken of the motion picture industry. This because the pictures created by the motion picture industry are not matters kept secret and clandestine, but are an open book; and petitioner affirmatively offered to prove at his trial that

in fact, and as a matter of common knowledge, no picture produced by the motion picture industry had ever furthered in any measure or manner any "dangerous idea" under any conceivable, reasonable standards, defining such; and more petitioner offered to prove that, even were he so inclined, he, as a writer of film scripts, was utterly without power or discretion under the practices of the industry to intrude into any picture support of any such idea.

Thus, in the instant case, the Committee has invaded the area of speech, thought and association in so unreasonable and roughshod a manner that even were the First Amendment no longer a part of the Constitution, the Committee's action would yet offend individual rights. And more important by far, so long as this court stands, the First Amendment retains life not only as a part of the Constitution but as the core and heart of free society in America. As has been shown, the Committee and the court below have so misconceived freedom of speech, thought and association as to formulate and act upon the proposition that mere ideas may constitute dangers from which government rightfully may protect the nation. This proposition in its entirety must be stricken down. It is at war with liberty.

II.

This Particular Inquiry Into the Hollywood Motion Picture Industry Lay Entirely Outside the Lawful Bounds of the Power of the House Committee Because It Constituted a Censorship of the Content of Motion Pictures and Thereby Violated the First Amendment.

Motion pictures enjoy the same protection under the First Amendment as the press and radio. Congress could not legislate a direct censorship of the *contents* of motion pictures. (*U. S. v. Paramount,* 334 U. S. 131, 166.)

The motion picture belongs in the category of the free arts; it is, in a sense, a composite form in which the arts of drama, painting, the plastic and graphic, as well as the visual and literary arts find expression.

"What is good literature, or has educational value, what is good art, varies with individuals as it does from one generation to another," but despite these wide variances, "under our system there is an accommodation for the widest variety of tastes and ideas," because the "requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." (*Hannegan v. Esquire,* 327 U. S. 146, 157-158.)

Motion pictures, like the play and the novel, offer us a medium for determining the truth of our existing concepts. They can point, on occasion, to the desirability of retaining the *status quo;* on other occasions, to the wisdom of social change. These expressions are desirable and should be unhampered by any governmental action if our way of life is to endure. Any censorship of the screen deprives Americans of their right of a free discussion of ideas and

concepts in the cultural field. The artist, the writer is just as much entitled to freely express his beliefs as the people are to receive them. To exercise censorship and restrict free communication of thoughts and beliefs from the artists to the audience is to "impoverish the intellectual life of the community." (Chafee, Free Speech, p. 529.)

Had the Committee used its asserted statutory power to investigate the content of American newspapers and had it demanded of a group of newspaper publishers that they abandon a particular editorial point of view and that they discharge and blacklist a group of editorial writers all associated with that point of view, the censorship in action would be crystal clear.

As applied to the motion picture industry the vice is the same.

The struggle for freedom from censorship, while centering around the press, was not limited to it. "The evils to be prevented were not the censorship of the press merely, but *any action* of the government by means of which it *might* prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." (2 Cooley, Const. Limitations, 8th Ed., p. 886, quoted in *Grosjean's* case (297 U. S. 233).)

Both before and since its application by the Athenians to Socrates, censorship has been defined as "the policy of restricting the public expression of ideas, opinions, concepts, and impulses which have or are believed to have the capacity to undermine the governing authority or social order which that authority considers itself bound to protect." (See Laswell, "Censorship," in Vol. 3, Enc. Soc. Sciences, p. 290.)

It was precisely this policy of restricting the public expression of ideas, opinions, concepts and impulses which was carried on here by this Committee, and it is precisely that policy of restriction which this Court has found to be "so abhorrent to our tradition that any use of it by any government agency should be stricken down." (*Hannegan v. Esquire, supra.*)

The argument that Congressional investigation is not censure or regulation is wide of the mark. The point is that such an investigation may in design and in fact be censure and regulation; petitioner here offered to prove that this particular investigation was precisely that, but the Court considered the proof immaterial.

Ordinarily, tax laws are not considered measures of censorship. But they may be—(*Jones v. Opelika,* 319 U. S. 103; *Murdock v. Pennsylvania,* 319 U. S. 105), and where shown to be such by the private citizen involved, they are judicially declared void. (*Grosjean's* case, *infra,* and cases cited.) This is so because "the Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." (*Cummings v. Missouri,* 4 Wall. 277, 325.)

In *Grosjean v. American Press,* 297 U. S. 233, the censorship was achieved indirectly by a circulation tax against Huey Long's newspaper adversaries; the tax measure was stricken as a patent device to affect the censorship of a newspaper by circuity; in *Hannegan's* case, *supra,* the proscribed censorship was likewise achieved by indirection through the process of an administrative order denying the second class mailing privilege to a magazine whose content displeased the literary tastes of the Post Master General; the roundabout method still led to the stone wall against censorship.

And in this particular case, the censorship was achieved in two ways:

1. By the utilization of the governmental power of a Congressional investigation committee to strike *directly* at the content of films by, first, directing the industry to make certain kinds of pictures;[1] by, second, directing the industry not to make certain kinds of pictures;[2] by third,

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[1]See Defendant's Rejected Exhibit 10; the following few examples are typical of the many there set forth:

"The Chairman: Well, has the industry the will to make anti-Communist pictures?

Mr. McGinnis: I think the industry is acquiring it.

* * * * * * * * * *

The Chairman: Mr. McGinnis, will these public hearings aid the industry in giving it the will to make these pictures?

Mr. McGinnis: It is my opinion that they will." [J. A. 487-488.]

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"Mr. Nixon: Under those circumstances I would like to know whether or not Warner Bros. has made or is making at the present time, any pictures pointing out the methods and evils of totalitarian Communism as you so effectively have pointed out the evils of the totalitarian Nazis.

Mr. Warner: We are preparing and will make one film, 'Up Until Now.'

Mr. Nixon: Under these circumstances, I think this Committee is glad to hear that Warner Bros. is contemplating for the first time now making a motion picture in which they point out to the American people the dangers of totalitarian Communism as well as Fascism." [J. A. 486.]

[2]The industry was repeatedly attacked publicly and criticized publicly by the Committee for having made the picture, "Mission to Moscow" [J. A. 489-490]; for having made the picture, "Song of Russia." [J. A. 490; cf. particularly J. A. 491.]:

"Mr. Stripling: Now, Mr. Mayer, you stated that you recently viewed the picture (Song of Russia)?

Mr. Mayer: Yes, sir.

Mr. Stripling: Is it your opinion that there were no political implications in it whatsoever?

Mr. Mayer: I am convinced of that. I am under oath and if I met my God I would still repeat the same thing";

for having made the picture, "North Star" [J. A. 494]; for having purchased the story, "Rachel" for motion pictures [J. A. 504]; for having made the picture, "None But the Lonely Heart" [J. A. 510].

suggesting standards and norms for the elimination of "slanted lines" and verboten scenes;[3] and,

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[3]The particular content of the films was publicly and repeatedly censured for possessing "slanted lines," for allusions to bankers as "heavys," to Congressmen as "crooks," and to the Russians as "somber and moody people" whose children, however, are depicted as "smiling, happy children," and for the utilization of a gesture or the lifting of an eyebrow to convey a "subversive" impression. *Cf.* Exhibit 10 and the following exemplars:

"The Chairman: Don't you think it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the Government by force or violence?

Mr. Warner: It would not only be foolish, it would be something they could not get away with in the American motion picture industry in California, or anywhere else.

The Chairman: Exactly. So what would they do. They would put in slanted lines wherever they could, and that is what you have been trying to keep out?

Mr. Warner: That is correct.

The Chairman: That is why you have been doing exactly the same thing in your business that we have been attempting to do in ours.

Mr. Warner: That is correct." [J. A. 505.]

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"Mr. Stripling: Can you tell the Committee whether or not in the past there have been efforts to discredit certain institutions of the American Government by constantly referring to the members of Congress as being crooks and so forth in the pictures?" [J. A. 506.]

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"Mr. Stripling: As a director, Mr. McCarey, what do you think the dangers are of permitting pictures to be made in which the institutions in this country are portrayed in a disparaging light? In other words, if pictures are made which always have the banker as a heavy as it has been referred to in the testimony, and that picture is shown in foreign countries, and so on, what do you think the ultimate effect would be?

Mr. McCarey: Well, naturally it would give a very unfavorable opinion of people who are successful in the United States.

Mr. Stripling: Do you think that is a dangerous practice for the moving pictures to pursue?

Mr. McCarey: I think it is a very dangerous practice." [J. A. 510.]

2. By the utilization of the governmental power of congressional investigating committee to strike *indirectly* at the content of films by blacklisting the men who create films, thus keeping their ideas off the screen.

As the history of totalitarianism clearly reveals, there can be no more effective censorship of any media of communication than a purge of the individuals identified, accurately or inaccurately, with the ideas and points of view which the censors want to expurgate. In the conquest of ideas, the taking of ten hostages can approximate in effect the direct suppression of ideas and points of view. This is precisely what Mr. Stripling had in mind (and realized) when he asked an employer spokesman for an industry, "Don't you think the most effective way of removing those Communist influences—and I say Communist influences; I am not saying Communists; I am not accusing them all of being Communists but don't you think the best way is the payroll route?" [J. A. 517; Rejected Defendant's Exhibit 10.] Seldom, if ever, has there been a more explicit statement of the censor's strategy of terror.

Not only were ten men and their ideas taken as hostages, but all those who remained in the industry together with their creative ideas stood in like jeopardy. This situation illumines the wisdom of the rule: 'It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom. (*Near v. Minnesota,* 283 U. S. 697; *Thornhill v. Alabama,* 310 U. S. 97.)

Nor can it be said that the investigators here were not imposing a censorship but were merely investigating to determine whether "some clear and present danger" or some "potential" threat thereof did in fact exist justifying some governmental concern and the resultant investigation into the Hollywood motion picture industry. In the first place, the investigation on its face reveals that this was no inquiry to determine the existence of any such clear or present or potential danger. Not only was the absence of any such danger apparent even to the Committee (which conceded as much before petitioner was called to the stand) but all of the investigators concurred in asserting the complete absence of any possible showing of such danger.

> (*Cf.* "The Chairman: Don't you think it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the Government by force and violence?"
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> * * * * * * * * *
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> "The Chairman: Exactly. So what would they do? They would put in slanted lines wherever they could and that is what you have been trying to keep out?") [*Cf.* Defendant's Rejected 10.]

No person can seriously suggest that from "slanted lines" which do not advocate overthrow of Government by force and violence, can there conceivably come to our country any substantive evil of such "extreme seriousness" possessing such a "high degree of imminent danger," as

would be necessary to justify governmental intercession in the area of speech and opinion. (*Cf. Bridges v. California,* 314 U. S. 252.)

Not only is this patent, but over and above all this stands the fact that petitioner himself offered to assume the burden of showing first to the Committee and later to the Court, the absence of any such dangers, whether clear or present or real or potential or fancied. Deeming all such proof immaterial, both the Committee and the Court refused to allow it. [Rejected Defendant's Exhibits 4, 5, 6; J. A. 394-409; Rejected Defendant's Exhibit 10; and see J. A. 335 and 336.] Thus did the Trial and Appellate Courts reverse the firmly established doctrine of this Court that an individual whose freedom of speech or expression is threatened by any governmental action may show the action to be excessive because no clear or present danger existed justifying the same, or because no reasonably represented potential threat thereof was shown, even assuming the test of the *Barsky* case, *infra.*

The Trial and Appellate Courts placed the judicial seal of approval upon this particular governmental usage of power to effectuate censorship. It should be stricken down.

III.

The Committee as an Agency of Government Used Its Powers Under Section 121 of Legislative Reorganization Act of 1946 to Impose a Blacklist Against the Petitioner and Other Named Individuals, and Thereby Placed Itself Above the Constitution and Disregarded the Elementary Requirements of Due Process of Law in That: (1) It Usurped the Power to Legislate Confided by the Constitution to the Concurrent Action of Both Houses of Congress and the President; (2) It Exercised Such Power in a Manner Prohibited Even to the Entire Legislature; (3) It Invaded the Area Delegated Exclusively to the Judiciary; and (4) It Exercised Such Judicial Power in a Manner Prohibited Even to the Judiciary.

On the grounds of "immateriality," the trial court refused to allow proof that the Committee used its processes as a governmental agency, including the hearing to which petitioner was subpoenaed, to initiate and effectuate a *purge*, through the establishment of a blacklist in the motion picture industry, of a group of named writers, directors and producers, including petitioner.[1]

The proof offered and refused was that the Committee, acting alone and without authorization of any law what-

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[1]Also, instructions proposed by the petitioner, dealing with this point were rejected. See, for example, petitioner's proposed instruction No. 25.

> "The jury are instructed that if they find upon all the evidence that the sole and primary purpose of the investigation of the defendant, John Howard Lawson, was to cause him to be discharged from employment in the motion picture industry, and to be blacklisted therefrom, then such investigation would not be a lawful 'question under inquiry' within the meaning of the statute, and the jury should find the defendant not guilty" [J. A. 369-70].

ever, had established certain standards of permissible and impermissible thought, speech and association;[2] that of its own prerogative the Committee determined that persons offending against those standards of thought, speech and association for such transgressions be deprived of and forever barred from employment as writers, producers or directors in the motion picture industry; that it, as part of a national program aimed at every part of American life and industry, had *used its hearings to initiate and effectuate a blacklisting* by all employers within the industry aimed generally at all persons violating said standards[3] and specifically at certain named individuals, including petitioner,[4] found by the Committee to have violated said standards.

So far from being immaterial, such conduct by the Committee marks usurpation of power and disregard of the doctrine of separation of powers and the arbitrary use of that assumed authority to destroy individual rights in a manner offensive to a host of constitutional principles

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[2]Simply stated, these standards condemned and proscribed all speech or thought with which the Committee chanced to disagree. Proscribed and outlawed under these standards as "communistic," "subversive" and "un-American" speech and thought were such ideas, among others, as advocacy of "absolute social and racial equality" [J. A. 461], recommending dissolution of the British Empire [J. A. 454], favoring a "planned economy" [J. A. 438] and questioning the divine origin of the rights of man [J. A. 461].

[3]Thus, for example, ex-Congressman Vail, then a member of the Committee, said during the course of the hearings: ". . . but, of course, we have the problem of eliminating the communist element from not only the Hollywood scene but also other scenes in America, and we have to have the full support and cooperation of the executives from each of those divisions." [Committee Hearings, p. 66, J. A. 518]. All of the members of the Committee agreed with the above statement and cooperated in using the Committees' power to achieve the desired results [Ex. 10 for Ident., J. A. 481, 513-18].

[4][J. A. 481.]

and completely inconsistent with the elementaries of due process of law.[5] In short, the Committee converted itself into a "purge agency," thus assuming powers completely foreign to and forbidden by our constitutional system.

The essential concept of the Fifth Amendment is that no agency of the federal government shall deprive any person of life, liberty or property save by and through the regularly established and recognized processes of law.[6] This requires first the existence of a law applicable to the situation concerned, a law duly and regularly enacted by the legislative organs established by the Constitution, the House of Representatives and the Senate, and approved by the President. The law so created and established must be free from substantive objection under the Constitution. Thus, it may not be a law imposing penalty upon past conduct, for such would be *ex post facto* legislation prohibited by Article I, Section 9, Clause 3 of the Constitution. Nor may it impose penalties upon named persons or

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[5]Man has never achieved a device better designed to destroy an individual, to deprive him of his liberty, his property and his dignity as a person, than a blacklist closing to him his chosen profession to which he has devoted a lifetime and from which he has secured a livelihood (*Cummings v. Missouri*, 4 Wall. 277; *United States v. Lovett*, 328 U. S. 303.

[6]That the deprivation of liberty and property (employment, reputation and career) was achieved by the Committee in the instant case by indirect and subtle use of governmental power rather than by formal criminal legislation imposing fine or imprisonment renders it more rather than less obnoxious. The command of the Constitution is that no governmental body shall "*deprive*" any man of liberty, property, or life without respecting and observing the limitations imposed by the Constitution. It matters not how government achieves the forbidden end. Whether by statute or by any other method or contrivance whatever, direct or indirect, no governmental agency has the right, authority or lawful power to deprive any person of liberty, property or life save through action consistent in all respects with the provisions of the Constitution. (*United States v. Classic*, 313 U. S. 299; *Screws v. United States*, 325 U. S. 91; *Catlette v. United States* (C. C. A. 4th, 1943), 132 F. 2d 902; *United States v. Trierweiler* (1943 E. D. Ill.), 52 Fed. Supp 4.)

identifiable groups, nor upon any fraction of society whatever under standards not applicable equally and alike to all persons similarly situated, for such legislation would constitute special legislation and would offend the constitutional prohibition against bills of attainder contained in Article 1, Section 9, Clause 3 of the Constitution. Finally, due process requires that penalty or punishment be imposed only upon a full hearing and determination of facts attended by those requirements of fair procedure traditionally recognized as essential to civilized justice.

The Committee here openly and flagrantly assumed power by "purge" to deprive petitioner of a lifetime's career and to impose upon him what this court has characterized as "punishment, and of a most severe type,"[7] without authority so to act of any kind, outside of all law and by and through processes established by its own fiat and conformable to no restraints save its own pleasure. This is the antithesis of due process. It is government by men where due process is government by law. If the Committee's conduct here be sanctioned by this Court, then a short circuit device nullifying the entire Constitution has been conceived and like hated predecessors the Committee may proclaim, "We *are* the Constitution."[8]

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[7]*United States v. Lovett,* 328 U. S. 303, 316.

[8]The Committee certainly so conceived itself. It considered itself not merely above the law and unfettered by the Constitution, but, indeed, immune even from criticism by common mortal. In its eyes, the fact that the American people engaged in "criticizing individual members of Congress" is evidence of a "widespread movement to discredit the legislative branch of our government," and this is "the essence of totalitarianism" [Ex. 9 for Ident., J. A. 433]. In its eyes, to oppose a bill authored by a member of the Committee is plainly "un-American" Ex. 9 for Ident., J. A. 464] and to criticize the Committee as a committee is to necessarily reveal a "red, sympathetic record" [Ex. 9 for Ident., J. A. 428]. In fine, criticism of the Committee is outlawed [see, entire Ex. 9 for Ident., J. A. 249-53, 420 *et seq.*].

Our entire framework of constitutional law is based on the principle that no branch of our government may perform the functions delegated to any other branch. Disregard of this essential long continued would render a single branch of our government all-powerful; it would substitute an absolutist government for one of limited powers. Under our system, the legislative branch of government is granted only the power to establish standards of conduct operative *in futuro* and applicable equally to all persons. The application of such standards to specific individuals, the adjudication of guilt for violating the same and the imposition of penalties in consequence of violation are matters entrusted solely to the judicial branch of government. In the instant case, the Committee, as a mere fractional subdivision of one house within the legislative branch of government, had the power neither to establish standards for judging conduct nor to apply such standards to individuals suspected of violating the same. Yet this Committee did both. More—it established standards to be applied to past conduct, something not even the legislature as a whole might constitutionally do. And it applied those standards to specific individuals and adjudicated the guilt of and imposed punishment and penalty therefor upon such individuals without even affording such persons a full, fair or reasonable hearing, something not even a Court might constitutionally do.

In fine, the Committee made itself the State,—above the people and above the Constitution. The Committee made its own law. The Committee made its own adjudication of "guilt." The Committee made its own rules of procedure, evidence and hearing.

Moreover, the procedure followed by the Committee cast aside every concept of procedural due process. The Committee predetermined petitioner's "guilt"[9] it acted as prosecutor and judge;[10] it filed no charges; it confronted petitioner with none of the witnesses against him and denied cross-examination;[11] it accepted from these witnesses hearsay, rumor, gossip and reckless, unsubstantiated charges, opinions and conclusions[12] and coupled these with the doctrine of guilt by association to establish the

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[9]Apropos the petitioner and nine similarly situated writers, directors and producers summoned before the Committee, Chairman Thomas stated before the Congress:

"The reason these ten individuals refuse to answer the question was because they were Communists. They knew that we had the evidence that they were Communists, and they knew we were in a position to expose their communist activities, which they had been engaged in over a period of years" [Deft. Ex. 11 for Ident., J. A. 546].

[10]See Deft. Exs. 9, 10 and 11 for Ident., in whole, J. A. 420 *et seq.*, 480 *et seq.*, and 546 *et seq.*

[11]Before the Committee, petitioner's attorney, Bartley Crum, Esq., specifically requested the right to confrontation and cross-examination, which requests were denied:

" 'Mr. Crum: May I request the right of cross-examination? I ask you to bring back and permit us to cross-examine the witnesses, Adolph Menjou, Fred Niblo, John Charles Moffitt, Richard Macauley, Rupert Hughes, Sam Wood, Ayn Rand, James McGuinness—

The Chairman: The request—

Mr. Crum: Howard Rushmore—

(The Chairman pounding gavel.)

Mr. Crum: Morrie Ryskind, Oliver Carlson—

The Chairman: The request is denied.' " [J. A. 214-15.]

[12]Witness the following example:

"Mr. Stripling: Has it ever been reported to you that certain members of the guild were Communists?

Mr. Reagan: Yes, sir; I have heard different discussions and some of them tagged as Communists.

Mr. Stripling: Have you ever heard that from any reliable source?

Mr. Reagan: Well, I considered the source as reliable at the time." [Deft. Ex. 10 for Ident., J. A. 536.]

"guilt" of the individual accused;[13] it refused effective aid of counsel;[14] it refused petitioner opportunity to defend or explain his thoughts and associations for which he stood "accused."[15]

Cf. Niznick v. United States (Mar. 7, 1949), C. C. A. 6, 173 Adv. F. 2d 328.

For refusal to answer questions in a proceeding aimed at him personally and designed to deprive him of liberty

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[13]For example, on one occasion, the Committee extracted from a witness whom it, itself, termed the greatest expert on communism ever to appear before it, the three tests of "guilt" indicated by the excerpt below:

"'Mr. Nixon: You indicated that belonging to a Communist front organization, in other words, an association with Communists, attending these planned meetings, making statements in opposition to the capitalistic system are three of the tests you would apply.

Mr. Menjou: Yes, sir.

Mr. Nixon: Do you have any other tests from your experience you would like to give this committee?

Mr. Menjou: I don't know of any better ones.'" [Deft. Ex. 10 for Ident., J. A. 530-31.]

[14]At the opening of the Committee hearings concerning the motion picture industry, in October, 1947, the following occurred:

"The Chairman: Mr. McNutt, the Chair would like to inform you that it is the policy of this committee to permit counsel to advise his client, the witness here on the stand, of his constitutional rights, and only on the question of his constitutional rights.

I would like to say to counsel that we hope you will bear with us in that and that it will not be necessary at any time to remind you of that.

Mr. McNutt: I understand, Mr. Chairman. Of course, I should like to make a request to be permitted to cross-examine witnesses.

The Chairman: You will not have that permission. It is not the policy of the committee to permit counsel to cross-examine witnesses. You will only have the right, the solemn right, to advise your client, the witness, on his constitutional rights. Nothing else. You are no different from any of the other attorneys who have appeared before this committee this year in the many hearings that we have had." [Tr. of Committee Hearings, Oct. 20-30, 1947, p. 7.]

[15]J. A. 188-189.

and property outside of the law and without even pretense of compliance with or utilization of the due processes of law, the government would punish petitioner for contempt. It is petitioner's response that whenever governmental officers or bodies presume to act under color of their authority and through the facilities of their office to impose upon persons loss of liberty or property rights secured by the Constitution, such officers or bodies have no power to act outside of and above the law, but like all agencies of government whatever may lawfully act only by and through the due processes of law (*United States v. Classic,* 313 U. S. 299; *Screws v. United States,* 325 U. S. 91). Here the "effect" of the Committee's action ". . . was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that cannot be done either by a State or the United States." (*United States v. Lovett,* 328 U. S. 303, 316-317.)

It is a full defense to the charge against petitioner here seeking to punish him for contempt for his conduct in the course of the Committee proceedings here, that those proceedings were from beginning to end lawless, contrary to and outside of the due processes of law and, accordingly, beyond the jurisdiction of the Committee and void [*Estep v. United States,* 327 U. S. 114, 121; *Niznick v. United States,* 173 Adv. Fed. 2d 328; *McGrain v. Dougherty,* 273 U. S. 135, 176; *Jones v. Securities and Exchange Commission,* 298 U. S. 1, 25-26.)

IV.

The Statute Creating the House Committee on Un-American Activities on Its Face and Particularly as Construed and Applied Is Unconstitutional in That (1) It Permits Investigation of, and as Construed and Applied Has Been Used to Investigate, the Content of Speech and Ideas, an Area in Which No Legislation Is Possible Thereby Exceeding the Boundaries of Legislative Power Under Article I of the Constitution, (2) It Permits the Very Process of Investigation to Be Used, and as Generally Construed and Applied It Has Been Used, to Expose and Stigmatize the Content of Any and All Speech and Ideas Disapproved by the Members of the Committee, Thereby Impeding and Placing a Burden Upon Free Thought, Speech and Association in Violation of the First, Ninth and Tenth Amendments, and (3) The Statute Is so Vague and Ambiguous That, as Applied in a Criminal Case, It Violates the First Amendment and the Due Process Clause of the Fifth Amendment.

Before considering the merits of the point here to be urged, it may appropriately be noted that the constitutionality of the statute creating the Committee in the instant case is properly before this Court on this petition. The legislative branch of the government has here instructed the executive branch to prosecute petitioner before the judicial branch. *It* has invoked the jurisdiction of the courts and has demanded that the petitioner be punished by and through the judicial process.

The creation and functioning of legislative committees may ordinarily be solely a matter of legislative concern;

but when the actions of a legislative committee affect the private rights and liberties of specific aggrieved individuals and when such a committee undertakes to invoke the judicial process in aid of forfeiting those rights and liberties, then of necessity the legality of the committee and its acts becomes a matter of judicial concern. Were the law otherwise, Congress, as this case bears witness, might act against named individuals, stigmatize their reputations and destroy their chance to earn a living, without opportunity existing anywhere for challenge or review of the legislative act. Not even out of deference to one of the other great branches of government has the Court suffered such unconstitutional wrong to stand without remedy. *United States v. Lovett,* 328 U. S. 303, 314. This Court and its subsidiary tribunals cannot become an accomplice to unconstitutional action depriving citizens of rights in violation of constitutional guarantees. *Shelley v. Kraemer,* 334 U. S. 1.

Since the validity of the statute creating the Committee and defining its authority is properly before this Court in his case, it is petitioner's position that the statute must be stricken as void and unconstitutional. The statute on its face will be considered first; later, it will be demonstrated that the constitutional defects appearing on the face of the statute have been consistently manifested by its construction and application.

The core of the statute, Section 121(b) Legislative Reorganization Act of 1946, P. L. 601, Chap. 753, 79th Cong., 2nd Sess., 60 Stat. 828, amending Rule XI(1) (2) of the Rules of the House of Representatives, authorizes the Committee to investigate "propaganda" which is "un-American" or "subversive." This patently authorizes in-

vestigation into the *content* of speech and ideas as such.[1] Yet under the First Amendment Congress possesses in that area no power of regulation whatever. It matters not that Congress here has characterized the speech and ideas proceeded against as "subversive" and "un-American." The Amendment protects the right of men to believe what they will and to speak out concerning their beliefs, whether the ideas involved be deemed either beneficial or harmful by Congress. Congress may no more regulate speech because it choses to label it as "un-American" or "subversive" or as attacking "the principle of the form of government as guaranteed by our Constitution" than it may regulate ideas by classifying them in any other manner. *U. S. v. Ballard,* 322 U. S. 78, 86-7; *Thomas v. Collins,* 323 U. S. 516.

The command of the Constitution is that as to *all* speech, Congress shall pass *"no* law" regulating content. Even where the members of this Court have disagreed as to the applicability of the First Amendment there has been unanimous concurrence in the proposition that it prohibits all censorship or control of the *content* of speech. (*Kovacs v. Cooper,* 93 L. Ed. Adv. Op. 379.) The words "un-American" and "subversive" used in the statute are so vague that their meaning can only be established by the opinions and prejudices of those interpreting and applying them. The effect of the statute is to authorize investigation into those matters of opinion which the members of

[1]That Congress here has described the subject of its action as "propaganda," rather than "speech," is without consequence. Propaganda is but an emotional synonym for speech and advocacy. In the words of the Court of Appeals for the Second Circuit, "propaganda" may be defined as "a plan for the publication of a doctrine or system of principles." (*Leubuscher v. Commissioner,* 54 F. 2d 998, 1000; *cf.* Funk and Wagnalls International Dictionary (1935 ed.), p. 1985.)

the Committee, unhampered by any specific definition of their authority, may deem "un-American" or "subversive." The statute insofar as it uses the terms "un-American" and "subversive" authorizes not only entry into the field of opinion, speech and association but a limitless and uncontrolled invasion thereof.

Nor is the statute aided by the authorization to investigate "propaganda * * * (that) attacks the principle of the form of government as guaranteed by our Constitution." This phrase is hardly more specific than the words "un-American" or "subversive." Moreover our Constitution contemplates the possibility and the right of the people to make changes in our form of government—even fundamental changes affecting the important principles of that form of government. *Constitution,* Article V. Congress may no more legislate with respect to the right to advocate ideas supporting basic changes in our government than it may regulate ideas supporting minor modifications. (*Schneiderman v. U. S.,* 320 U. S. 118.) There can be no valid legislation controlling the *content* of ideas respecting the form and organization of government.

An investigation into the content of speech cannot possibly relate to or be in aid of any valid legislative function.[2] Where investigation by Congress cannot be related to nor made to subserve any permissible legislative object respecting such matter over which Congress is granted power of regulation, the investigation exceeds legislative right. In the words of this Court, the Government of

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[2]True enough the statute speaks of investigations "that would aid Congress in any necessary remedial legislation." For the reasons stated, however, no legislation by Congress is possible in the area defined by the statute. Therefore the recitation of the legislative object is idle superfluity.

the United States is a government of "delegated, limited and enumerated powers." (*United States v. Harris,* 106 U. S. 629, 635.) And in the words of the Constitution, the authority of Congress is but authority to exercise the "legislative powers herein granted"[3] and no others. The powers expressly granted to Congress in Article I, Section 8, Clauses 1-18, together with such implied powers as may be found appropriate and essential to effective exercise of these powers, constitute the entirety of Congress' authority.

McCulloch v. Maryland, 4 Wheat. 316, 405;
Martin v. Hunter's Lessee, 1 Wheat. 304.

The power to investigate not being an express power, then where investigation is attempted by Congress, the inquiry in each case must be "whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." (*United States v. Harris,* 106 U. S. 629, 636.) Were it otherwise, the assertion of the power to investigate or the use of implied powers as ends in themselves would effectively nullify all constitutional limitations on Congressional jurisdiction.

Kansas v. Colorado, 206 U. S. 46, 81;
United States v. Butler, 297 U. S. 1, 64;
Carter v. Carter Coal Co., 298 U. S. 238, 291.

In the instant case Congress and the Committee have defied these elementary principles. Under the statute the Committee has assumed power to "investigate" for the purpose of "exposure," independent of and unrelated to

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[3]Article I, Section 1.

any possible legislation or the need therefor.[4] It claims that it may use its investigatory power *generally* to "expose," on the outright premise that "exposure" is a permissible *end in itself*.[5]

This is usurpation of power thrice multiplied. Investigation is an implied power only, exercisable only as an incident to and in aid of legislative objects within the scope of Congress' jurisdiction under the Constitution; and exposure is in turn but an incident of the limited and implied power of investigation.

McGrain v. Daugherty, 273 U. S. 135, 160 *et seq.*;
Kansas v. Colorado, 206 U. S. 46, 89;
Schechter v. United States, 295 U. S. 495, 528.

Were it to be conceded that in certain areas Congress should be indulged the power to investigate or expose,

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[4]The statute scarcely purports to authorize the Committee to exercise such claimed power. By its terms it authorizes the Committee to "make from time to time investigations." It says nothing about hearings for the purpose of exposure as distinct from investigation. Furthermore, the investigations authorized are of (1) "un-American propaganda activities" and (2) "the diffusion . . . of subversive and un-American propaganda . . ." and (3) "all other questions in relation thereto that would aid Congress in any necessary remedial legislation." Sec. 121(b), Legislation Reorganization Act of 1946, P. L. 601, Chap. 753, 79th Cong., 2nd Sess., 60 Stat. 828. This indicates that Congress authorized hearings for the purpose of getting information "that would aid Congress in any necessary remedial legislation" and not for the purpose of exposure, as such.

[5]"This Committee is the only agency of government that has the power of exposure . . . there are many phases of un-American activities that cannot be reached by legislation or administrative action . . ." H. R. Rep. No. 1, 77th Cong., 2nd Sess., 16 (1940). See, also, H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939); H R. Rep. No. 2742, 79th Cong., 2nd Sess., 16 (1940).

The Chairman in his final statement at the close of the hearing on October 30, 1947, said: "This hearing has concerned itself principally with spotlighting Communistic personnel in the industry. [J. A. 484, 485. See, also, Ex. 10 for Ident., J. A. 480-486.]

free from requirement that the exercise of these powers bear reasonable relation to the gathering of facts useful to the task of legislating, assuredly no such concession may be tolerated within the area lying close to the First Amendment.

There is an obvious difference between exposure by Congress of the practices of governmental departments or its own membership and its exposure of the ideas and associations of private individuals. The former informs the sovereign people of the manner in which their servants perform their obligations and it is, therefore, consistent with our democratic institutions.[6]

The latter would give government an unprecedented power to exercise supervision and control over the people in the exercise of their sovereign liberties of speech, thought and association, and thereby destroy the very core of our democratic institutions. This domain of the First Amendment is utterly denied to government and it is denied for the most imperative of reasons. It is denied because it is the deepest premise of our way of life that the people, and they alone—free from governmental interference—may determine what ideas they shall accept and what ideas they shall reject by and through the freest interplay of opinion and speech in the market place of ideas. (*Thornhill v. Alabama,* 310 U. S. 88, 97-103; *Thomas v. Collins,* 323 U. S. 516, 543; *West Virginia*

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[6]Those who have urged that the power of exposure is an important one and should be broadly indulged have invariably dealt with exposure of the operation of government agencies—an area most definitely within the scope of legislative power. See, for example, such articles as Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. Pa. L. R. 691, 811; *Galloway, Investigative Function of Congress,* 21 Am. Pol. Sc. Rev. 47, 62; Cousens, *Investigations Under Legislative Authority,* 26 Georgetown L. J. 905, 918; McGeary, *The Developments of Congressional Investigative Power,* p. 104.

State Board of Education v. Barnette, 319 U. S. 624, 641; *Yick Wo v. Hopkins,* 118 U. S. 356, 370.) Here, the power of exposure which the Committee assumes for itself stretches the strong arm of government into that market place. This it may not do.

Thornhill v. Alabama, 310 U. S. 88, 97.

All of the foregoing is clear as a matter of principle alone. But the record in the instant case illustrates and emphasizes the fundamental wisdom of the doctrine by revealing in practice what the principle comprehends in theory. Here the evils inherent in such a grant of power as is claimed by the Committee are revealed with naked clarity by the actual exercise of claimed power by the Committee. Exposure no longer has as its objective the providing of the legislature with requisite information. Exposure is used as the means of depriving non-conformists of their means of livelihood and of inflicting other pains and penalties upon those who refuse to yield to the inquisitions of our times.[7] The power to expose now means the power to punish—to punish without a law providing for punishment and without a trial in which "guilt" is determined—and all because men allegedly hold ideas and join in associations which this Committee has declared *verboten.*

The petitioner, through offers of proof and requests that the Court take judicial notice of certain facts, has made a record which reveals the extent of the thought control which this Committee would impose upon the American people. The offers establish that the Committee

[7]Thus, for example, during the hearings the Committee Chairman said, ". . . you persons high up in the industry can do more to clean your own house than can anybody else, but you must have the will power, and we hope that by spotlighting these Communists you will acquire that will." [J. A. 522.]

construed and applied its authority to permit it to determine without limit what opinion, speech and association is to be censured and then to utilize its powers to suppress what it has condemned. It has been used, not as an instrumentality to inform the Congress as to what legislation it should enact but rather as a means of determining for the people what ideas they might safely hold, express and associate to support. It has not deemed itself responsible to the people; instead it has held the people accountable to it. It has called many witnesses not for the purpose of getting facts from them; rather it has required witnesses to appear in order to be instructed as to what they should do in their private lives and their private businesses.

The unlimited character of the investigatory power into thought and speech as it appears upon the face of the statute has been utilized by the Committee to the very hilt. The range of ideas upon which the Committee has sat in judgment and issued denunciations touches every controversial subject in modern American life. The epithets "un-American" and "subversive" have been hurled at advocacy of racial equality, adherence to the New Deal, support of rent control, opposition to cartels, action on behalf of the Geyer Anti-Poll Tax Bill, condemnation of denial of meeting places to Henry Wallace, etc., etc. More than 1,200 organizations and in excess of 1,000,000 individuals have been cast outside the pale of Americanism by this Committee. Careers have been ruined, jobs lost, reputations besmirched by the utilization of claimed governmental power by this Committee. Above all, it has hampered free speech and association in a manner and to an extent unequalled in our history.

This Court is properly not concerned here with the wisdom of the views expressed or positions taken by the Committee and petitioner does not otherwise contend. For this Court has no greater right to censor or pass upon the political views of the members of the Committee than the Committee had to censor the opinions of private citizens. What this Court is concerned with is the lawfulness and constitutionality of the Committee's assertions of power and of the statute claimed to authorize the same. Whether a statute may create a congressional committee as the arbiter of orthodoxy in the field of political, social and economic ideas presents a vital question which cries out today for determination by this Court.

It is petitioner's position that however facile may be the spokesmen for such a committee in devising justifications for such action, such spokesmen can never escape the simple truth which stands forth in the record here with such tragic clarity—namely, that the statute here, upon its face and as generally construed and applied by the Committee, and as particularly applied in this investigation, has laid a fearful burden upon freedom of speech, press, thought and association, and is, therefore, unconstitutional, unlawful and void. (*Grosjean v. American Press Co.*, 297 U. S. 233.) Indeed, the Court below concedes that the statute does burden speech but justifies such burden on the premise that it is laid upon a vital subject, and an important medium of communication.

Speech and association are not free if they may be exercised only under constant threat of official exposure and condemnation. Legislation which permits the impo-

sition of such burdens upon speech and association trespasses upon the express limitations of the First Amendment. For a citizen to defy and challenge the exercise of power under such legislation can be no punishable offense, since it is but the performance of his sovereign duty as a citizen and as a man.

As for the contention that the power of investigation must necessarily be broader than the legislation possibly flowing therefrom, is it not apparent that "civil liberties may not be abridged in order to determine whether they should be abridged"?

Finally, and apart from considerations of freedom of speech, press, thought and association and the other considerations heretofore discussed, the statute is separately unconstitutional on its face because the vagueness of the terms "un-American" and "subversive" and of the phrase "the principle of the form of government as guaranteed by our Constitution," employed in the statute render it so ambiguous and devoid of ascertainable meaning as to offend the due process clause of the Fifth Amendment.

United States v. Reese, 92 U. S. 214;
Cline v. Frink Dairy Co., 274 U. S. 445;
Winters v. New York, 333 U. S. 507.

The statute manifestly can have only such meaning as the views and prejudices of the Committee members place upon it. Particularly where it enters the area of the First Amendment, such a statute when it is involved in a criminal case must be stricken as offensive to the due process clause of the Fifth Amendment.

V.

The Trial Court Committed Numerous Prejudicial Errors and Denied Petitioner a Fair Trial Under the Sixth Amendment by Its Rulings, Instructions and Comments.

A. The Subcommittee Before Which Petitioner Appeared Was Not Shown to Be a Lawfully Constituted Tribunal, and the Trial Court Committed Prejudicial Error by Reason of Its Rulings and Instructions Which Prevented the Jury From Considering This Fact in Reaching Its Verdict.

The House Committee on Un-American Activities is a standing committee consisting of nine members, (Legislative Reorganization Act of 1946, 60 Stats. 812, Sec. 121). Only eight members have actually been designated as members of the Committee by the House of Representatives. [Govt. Ex. 3, J. A. 380.]

On the day petitioner testified only three of the members of the Committee including the chairman were present. The chairman announced that a sub-committee was present, consisting of himself and the other two members. [J. A. 185-186, 197-198.]

Despite objections by the petitioner the trial court permitted the chairman of the committee to testify first, that he had the authority to appoint a sub-committee, without stating when, where or how that authority had been obtained, and second, that he exercised this authority on the day the petitioner testified by announcing that a sub-committee was present consisting of himself and the other two members of the committee in attendance. [J. A. 185-186, 197-198.] Aside from the testimony of the formation of the committee as a whole and the designation of its members by the House of Representatives,

this constitutes the entire proof in the record of the existence of a legally competent tribunal.[1]

The trial court did not even permit the jury to determine for itself whether the chairman's naked assertion concerning his power satisfied it that the authority claimed actually existed. Instead he instructed the jury that if it was established that the chairman designated a subcommittee, then that proof, in and of itself, required the jury to find the existence of a validly constituted subcommittee. [J. A. 355.] Thus the jury was in effect told that, as a matter of law, the chairman had the authority which he asserted.[2]

Nowhere in the statute creating the committee or in any other statute or provision of law is there any proviso

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[1]These hearings were marked by the persistent absenteeism of members of the Committee. Only three members were present at the opening of the hearings October 20, 1947 [Comm. Tr. 1]; four were present at the outset of the hearings on October 21 [Comm. Tr. 91], on October 22, [Comm. Tr. 135] and on October 23, [Comm. Tr. 189] on October 24, only two were present [Comm. Tr. 229]. Each morning the chairman announced that a subcommittee was present, in each case indicating that the sub-committee consisted of those members who happened to be present at that time. On October 21, a 5th member of the Committee came into the hearings late and at that point the chairman said, "I want to show that Mr. Wood is here. We now have a quorum of the full committee." [Comm. Tr. 93.] Actually the committee acted through who ever happened to be present at any given time. Certainly it cannot be that a legally competent tribunal may have the number and composition of its membership determined upon the happenchance of who happens to be present at any given time without any continuity whatsoever of the personnel of the said tribunal. Nor is the situation bettered by calling who ever happens to be present either a committee or a sub-committee.

[2]It is submitted that the instructions, requested by the petitioner and refused by the trial court, to the effect that the committee must act through a quorum or through a sub-committee appointed or in some manner authorized by the full committee (petitioner's proposed instructions Nos. 37-48, inclusive. [J. A. 372-375].) correctly state the law.

that the chairman may determine when sub-committees should sit or how they should be constituted. The House specifically delegated its powers to investigate to those 8 named members of the committee [Govt. Ex. 3 J. A. 380]. This delegated power then resided in a majority, i.e., a quorum, of these 8 members. This majority, in turn, could delegate its power insofar as any specific investigation was concerned, to a sub-committee, either by directly designating the sub-committee or by authorizing its chairman to do so [see *Norris v. United States,* 300 U. S. 564, 569; *United States v. Seymour,* 50 Fed. 2d 930].

But there is no evidence in this record that the majority of the committee ever so delegated its power. If it had, this would have been a fact incumbent upon the Government to prove before the jury, just as it proved, through its exhibit 3, the original delegation of power by the House to the committee.[3]

The government not only did not prove this fact, but when petitioner attempted to prove its non-existence by subpoenaing the records of the committee, the trial court completely thwarted his efforts by granting the Government's motions to quash the subpoenas. [J. A. 344-346.]

Here the factual question as to the authority of the chairman to determine that a sub-committee should sit and to designate it, was taken from the jury—just as in the case of *Christoffel v. United States,* (No. 528, decided June 27, 1949) the question of the existence of

[3]In the case of *Meyers v. U. S.,* 171 Fed. 2d 800, the committee ratified the appointment of a sub-committee by the chairman. This ratification, which took place several months before Gen. Meyers testified, had the same effect as an appointment on delegation of authority to appoint, made by the committee in the first instance.

a quorum was taken away from the jury. Moreover, in the *Christoffel* case, the existence of a legally constituted tribunal, at the time the hearing was commenced, was conceded. Here the issue presented involves the far more serious question as to whether such a tribunal ever came into being.

Not only is there no support by statute rule or regulation for the proposition that the chairman has the authority here claimed, but the legislative history of the Legislative Reorganization Act of 1946, 60 Stat. 812, indicates that Congress intended no such grant of power. In the committee report regarding that Act the following appears:

> "Every chairman, even though he is the executive of the committee, should be bound by the decisions of its members as expressed in regular committee session." [Report of the Joint Committee on the Organization of Congress—pursuant to House Cong. Res. 18—Rep. No. 1011 in Section 1, subdivision 6 thereof].

This indication of legislative intent is simply a restatement of the familiar rule that in the absence of a delegation of authority from the entire body, acting through a quorum, no minority thereof, let alone the chairman or any other single individual, may bind the majority or act on behalf of the entire body. [*United States v. Ballin, Joseph & Co.*, 44 U. S. 1 at 7].

Moreover by his instructions the trial judge also determined for the jury the question of fact as to whether Chairman Thomas, by his assertion that a sub-committee was sitting, had designated a committee. Thereby every question of fact concerning the existence of a legally competent tribunal was taken away from the jury.

The judge charged the jury:

> "Evidence introduced during the trial has indicated that the chairman of the committee . . . on Oct. 27, 1947, *convened a meeting of a subcommittee designated by him* to be Congressman McDowell, Congressman Vail, and himself." [J. A. 355]. (Emphasis added.)

He then went on to instruct the jury that in order to find that there was a validly constituted sub-committee, the jury need only determine that the chairman "designated Congressman McDowell, Congressman Vail, and himself as a subcommittee." Thus the judge first told the jury that the chairman had designated a sub-committee and then informed the jury that if it found that the chairman did designate a sub-committee, it must find that there was a validly constituted sub-committee.[4]

To leave no doubt about the fact that he did not consider the existence of a validly constituted tribunal an issue to be decided by the jury, the court charged:

> "If you believe, and believe beyond a reasonable doubt, that the defendant appeared before the committee—and that is not controverted by the defense —that he was sworn—and that is not controverted —and that he was asked some questions—and that

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[4]That the trial judge intended to decide this question as a matter of law is indicated by the following discussion which took place when he granted the government's motion to quash the petitioner's subpoenas directed to records related to this issue:

> "The Court: Well, here it is very clear that Public Law 601 authorizes the Committee on Un-American Activities to act as a whole or by subcommittee to investigate propaganda activities. It is undisputed that there was a Committee on Un-American Activities of the House, of which J. Parnell Thomas was the chairman. It is also undisputed, because of the evidence by Chairman Thomas and by the transcript of the record itself, that a meeting was held on October 27, 1947,

is not controverted—and that he refused to answer questions, it is your duty under the law to return a verdict of guilty . . . So that, as I say, if you believe beyond a reasonable doubt that the question was asked and the defendant did not give a responsive reply, it is your duty under the law to return a verdict of guilty." [J. A. 358.]

By these instructions the court informed the jury that the only issue which was controverted and which was before it was whether there was a refusal to answer.

In *Fleishman v. United States* (U.S.C.A.-D.C. No. 9852, decided April 8, 1949, Govt. petition for cert., No. 838, Oct. Term, 1948, still pending), a contempt conviction was reversed because the question of whether the committee members present constituted a quorum, i.e., a legally competent tribunal, was decided by the trial court alone. The appellate court reversed, stating that the quorum issue was one of fact for the jury to decide, and, therefore, even if the evidence on that matter were conclusive, it should not be determined by the court as a matter of law.

Such a determination was made by the trial court here.

As has been noted above, the *Christoffel* case is determinative of the issues presented here. However, the error here is more aggravated than that in the *Christoffel* case.

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at which time the chairman of the committee designated Congressman McDowell, Congressman Vail, and Congressman Thomas as the subcommittee to conduct those hearings. So I will rule that that is a validly constituted committee, and you may have an exception.

"Mr. Kenny: Your Honor, I think, to make the record clear—

"The Court: Oh. yes, I want the record clear, because if I am wrong, you can appeal it.

"Mr. Kenny: You are granting the motion of the Government to quash?"

"The Court: That is correct." [J. A. 346].

There the Government established, as the opinion points out, that the hearing was before a legally convened Congressional committee as appeared "from the committee's records." Thus in the cited case, as distinguished from the instant case, the government's proof was based on the Committee records. Here, however, the committee's records, if any, were excluded by the court. There the Government relied on the best evidence; here the best evidence was kept out of the record.

Section 133(b) of the Legislative Reorganization Act of 1946 requires that each committee "shall keep a complete record of all committee action." Where a public body is required by law to keep records, it can only act by means of making a record [*State ex rel School District of Afton v. Smith,* 336 Missouri 703, 80 Fed. 2d 858; *People v. Cleveland* 271 Ill. 226, 110 N.E. 843]. The trial judge, by his rulings, refused to permit the petitioner to produce records which not only were the best evidence, but which were the only competent evidence on this issue.

This is not merely a technical point. Convictions for much more serious crimes involving moral turpitude have been reversed by this court where lack of authority was demonstrated in the officer or tribunal before whom the critical act took place. [See *United States v. Curtis,* 107 U. S. 671, and cases cited in the annotation of said case at 27 L. Ed. 534.]

The question involved herein is not an "intra parliamentary controversy" which this court has properly left to parliaments [*Coleman v. Miller,* 307 U. S., 456, 469]. The application of the rules of Congress properly becomes a judicial question when it affects the rights of a non-member [*United States v. Smith,* 286 U. S. 6, 33].

B. The Charge of the Court That (a) a Non-Responsive Reply, or (b) a Reply That Seems Unclear to the Jury Is Per Se Conclusive Proof of a Refusal to Answer, and the Comments of the Court to the Effect That Petitioner Was Not Trying to Answer the Question Constituted Prejudicial Error.

The central, if not the only issue of fact which the Court permitted the jury to determine was whether there was proof of a refusal to answer. In its charge the Court said:

> ". . . If you believe beyond a reasonable doubt that the question was asked and that the defendant *did not give* a responsive reply, it is your duty under the law to return a verdict of guilty." [J. A. 358; emphasis added.]

The Court further charged:

> ". . . The nature of the activities of the defendant is not an issue in this case, and it is your duty entirely to disregard any speculation on that subject. In other words, whether or not the defendant is or was not a member of the Communist Party actually is not relevant to this case." [J. A. 356.]

* * * * * * * *

> *"Now in testing whether or not you believe from the evidence that the defendant answered the question propounded by the Committee, you must decide for yourself whether or not the answers given by the defendant satisfy you now as to whether or not he ever was or is a member of the Communist Party. If you can come to a conclusion by the replies the defendant gave to those questions . . . if you can answer by those replies . . . as to whether or not he ever was or is now a member of the Communist Party, then, of course, it is your duty to*

return a verdict of not guilty. If you cannot, you must return a verdict of guilty." [J. A. 359;* emphasis added.]

The error of these instructions consisted of (1) the equation of a *failure* to give a responsive answer with a refusal to answer, (2) the requirement that guilt be found if there were an *unclear* answer, which the Court thereby ruled was the same as a *refusal* to answer, (3) the effective determination *as a matter of law* of the only question purportedly submitted to the jury, resulting from the elimination from the jury's consideration of the circumstances from which it might determine whether there had been a *refusal* to answer, and (4) the misleading and ambiguous language in the instructions which could only confuse the jury in determining whether there had been a *refusal* to answer.

1. The Court advised the jury that if the petitioner "did not give a responsive reply" he was guilty. Thus the words "did not give a responsive reply" (*i. e.*, failure to answer responsively) are substituted for "refusal" (*i. e.*, a deliberate and intentional act). By no conceivable test . . . whether it be the test laid down in *Fields v. United States,* 164 F. 2d 97, 82 U. S. App. D. C. 354, which requires the Government to show the refusal to be deliberate, or the test in *United States v. Murdock,* 290 U. S. 392, which requires the Government to show evil motive or bad purpose, as well as deliberateness . . . has it ever before been suggested that a person is guilty of criminal contempt merely because the witness *fails to or does not give* a responsive answer.

*It is submitted that the law was correctly stated in petitioner's proposed instructions Nos. 61 and 66, as well as Nos. 49-60 incl., and Nos. 62-66, incl., all of which were refused [J. A. 347, 375-378].

2. By instructing the jury that a conviction was required if the jury could not determine from the petitioner's answers whether or not he was a Communist, the Court declared an unclear answer to be the equivalent of a refusal to answer.

The offense defined by the statute is the deliberate and intentional refusal to answer a pertinent question. An unclear answer may be some evidence of a deliberate refusal to answer; and perhaps the Court might have so instructed. But the fact that the jury might be unable to attribute a completely responsive meaning to a reply cannot be accepted as conclusive proof of a refusal to answer. And not every non-responsive reply is necessarily criminally contumacious. If it were so, then few witnesses anywhere could escape the reach of Section 192.*

This charge directs guilt where a jury may have reasonable doubt respecting the responsive or non-responsive quality of a reply to a question; customarily such reasonable doubt demands a verdict of not guilty. Here, however, this doubt becomes paradoxically the hallmark of guilt.

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*The confusion attending this instruction concerning responsiveness is increased by a consideration of the uncertainty as a matter of law of the meaning of a "responsive" answer and the uncertainty as to the legal effect of an assertedly non-responsive answer. Professor Wigmore in his work on Evidence (3rd Ed., Par. 785), deals fully with the subject and states:

> "Paragraph 785. NON-RESPONSIVE ANSWERS. Where the witness, either in a deposition or on the stand, goes beyond the scope of the question and makes an answer not responsive, there is here nothing *per se* wrong. . . . This topic of responsiveness has somehow become in modern times beset with crude misunderstanding that tend to suppress truth and turn the inquiry into a logomachy. . . . No party is owner of facts in his private right. No party can impose silence on the witness called by justice."

3. In determining whether there had in fact been a refusal to answer, as distinguished from a failure to answer or an unclear answer, the jury had to consider whether under all the circumstances shown there was such a refusal.

The evidence before the jury showed that Mr. Lawson, while on the witness stand, had made a number of requests and statements, among which were (1) that he be allowed to read to the Committee a full statement of his position, as had witnesses who had preceded him, (2) that witnesses be called back for cross-examination to prove that they had perjured themselves when maligning him and calling for his discharge and to show what the Committee really was seeking to do, and (3) that the questions were in violation of his constitutional rights.

And the record shows that while in the middle of a response, and after much gavel pounding, the defendant was ordered from the stand by the Chairman's command to the bailiffs—"Officers, take this man away from the stand." In any and all events the Court should have directed the jury to weigh all of these circumstances in determining whether, assuming a failure to answer, it had been so deliberate and intentional as to constitute a refusal.

Obviously, the jury could not tell from the petitioner's answers whether or not he was a Communist. Therefore, the *practical* effect of precluding consideration of all other circumstances was to instruct the jury that there had been a refusal to answer.

4. At the very least the instructions are confusing, equivocal and misleading, first as to whether the test of refusal is the clarity or lack of clarity of the reply or whether it is the responsiveness or non-responsiveness of

the answer, and, second, as to the extent to which the determination by the jury of petitioner's membership or nonmembership in the Communist Party was relevant to the issues submitted to the jury. Instructions so framed constitute prejudicial error.

Kraus v. U. S., 327 U. S. 614;
Bihn v. U. S., 328 U. S. 633.

5. The erroneous instructions were aggravated by the Court's comment during argument to the jury wherein the jury was told by the trial judge that there "was nothing in the record to indicate that he (petitioner) was trying to answer the question" and that defendant's statement of his reason for objecting to the question "is not in the case." These comments were made despite the fact that the charge to the jury included the following:

> "The defendant takes the position, through its counsel, in arguing the case to you, from the evidence submitted by the government and the transcript of the case, that he was attempting to answer the questions; . . ." [J. A. 357.]

During the course of defense argument to the jury the following occurred:

> "Mr. Kenny (Counsel for Petitioner): . . . He was trying to answer it in his own way.
>
> Mr. Hitz (Counsel for the Government): Just a minute; I will have to object again. There is no evidence that Mr. Lawson was trying to answer the question.
>
> Mr. Kenny: Isn't that the question the jury has to decide?
>
> The Court: There is nothing in the record to indicate that he was trying to answer the question. You can refer to the record.

Mr. Kenny: That is correct. That is what I will argue at length, and in so answering he said he was trying to protect the rights of everyone regardless of politics or religion. . . .

Mr. Kenny: . . . I say to you, Mr. Hitz, it is right in the transcript. Mr. Lawson said—I will have to have a little more time if I have to argue this piecemeal—he said the right of immunity of American citizens will be prejudiced, Jews, Catholics, Republicans, Democrats, or anyone else. That is what he was talking about when he was finally removed from the witness stand. He said, 'You are trying to destroy—' and the chairman said, 'Officer, take this man away from the stand.' He was in the middle of a sentence when he was ordered from the stand.

Mr. Hitz: I will have to object again. I think the reason given by this man is not in the case.

The Court: No, it isn't." [J. A. *Lawson,* 348-349.]

These were critically important and unfair comments by the Court on the ultimate factual issue which was the jury's to resolve and constituted prejudicial error.

Patton v. U. S., 281 U. S. 276;

United States v. Murdock, 290 U. S. 389, 392.

Certainly the trial court did not follow the rule of this Court that "the decision of issues of fact must be fairly left to the jury" and that the trial judge must use great care that his expression of opinion should not be *misleading* or *one sided.*

Quercia v. United States, 289 U. S. 469;

Bollenbach v. United States, 326 U. S. 606.

C. The Trial Court Committed Prejudicial Error in Refusing to Permit Cross-Examination of the Principal Prosecution Witness, J. Parnell Thomas.

Aside from the introduction of formal documents (such as the resolution setting up the House Committee on Un-American Activities and the subpoena [Prosecution Ex. 1 *et seq.*]) the testimony of Congressman J. Parnell Thomas was the *only* prosecution evidence. He testified to the questions put to the petitioner before the Committee, and he testified concerning the alleged refusal of the petitioner to answer. Without his testimony, no *corpus delicti*, no crime of any kind, was shown. Nevertheless, all effort effectively to cross-examine this witness was shut off by the trial court. To illustrate:

(a) On direct examination, before the jury, the Court, itself, asked the witness the following question:

> "Q. With reference to those dates, Congressman, that you referred to on the cover of that transcript, what was the committee investigating at that time? A. We were investigating Communist infiltration in the motion picture industry.
>
> The Court: Very well." [J. A. 197.]

A motion on behalf of petitioner to strike the answer was denied [J. A. 197-198]. Nevertheless, the efforts of the defense to cross-examine the witness on this answer were prevented by the rulings of the Court [J. A. 202-203].

If cross-examination had been allowed, petitioner would have had the opportunity to establish his contention that the Committee was not actually investigating anything, but on the contrary was carrying on a proceeding designed to blacklist the defendant and to censure the screen.

If evidence as to what the Committee was engaged in doing was not admissible, it should have been stricken by the Court; if it were admissible, cross-examination should have been allowed. By its inconsistency, the Court committed error. This error was magnified by the Court's charge to the jury:

> "You will recall that the testimony tended to show that the committee was investigating the infiltration of communism in the motion picture industry. . . ." [J. A. 355.]

(b) The witness testified on direct examination respecting some of the things which happened while the petitioner was on the stand on October 27, 1947. The petitioner by cross-examination attempted to show the written statement which the defendant had tried to present to the Committee while he was before it [J. A. 199] and the efforts of the defendant (made at the same time) to be allowed to question those Committee witnesses who had testified against him during that same hearing and prior to the defendant's taking the witness chair [J. A. 214-216]. The defendant's attempt to develop these matters by the cross-examination of Mr. Thomas was no more than the equivalent of an effort to get before the jury the whole of a conversation after a part of it had been introduced.

Without knowledge of all the circumstances, the jury might have considered the petitioner's responses deliberately evasive, perhaps even offensive; on the other hand, had the jury been allowed to hear all of the attendant circumstances, it might have concluded that petitioner was raising reasonable objections and was not refusing to answer the question.

The accused was entitled to the jury's determination of this issue, aided by all the light that might be brought to it through cross-examination.

The denial of cross-examination was prejudicial error, regardless of whether it should be concluded that there was sufficient evidence to support the jury's finding.

Arine v. U. S. (C. C. A. 9th), 10 F. 2d 778;

Bollenbach v. United States, 326 U. S. 615.

(c) On direct examination on the issue of pertinency, the witness read into the record certain of the testimony relating to the petitioner given at the Committee hearings prior to the time that the petitioner testified before the Committee [J. A. 188-197]. On cross-examination the defense sought to introduce other portions of the testimony given at the hearing at the same time and on the same subject matter [J. A. 219-244]. These attempts were cut short, apparently on the theory that the question put to petitioner was pertinent as a matter of law [J. A. 207]. Accordingly, the defense moved to strike the evidence offered by the government on the question of pertinency, but this motion was denied [J. A. 243-244].

The Court thus determined the question of pertinency on the basis of the prosecution's evidence on pertinency (having refused to strike that testimony) while denying to petitioner the opportunity on cross-examination to ask questions concerning and to develop further precisely those matters brought out on direct examination and relied on by the prosecution.

D. The Court Committed Prejudicial Error in Excluding Petitioner's Evidence That the Committee Failed to Certify to the House of Representatives All of the Material Facts Relating to the Alleged Failure to Answer.

When a committee witness fails to answer a pertinent question, the "fact of such failure" must be reported to the House of Representatives (Act of June 22, 1938, c. 595, 54 Stats. 942, U. S. C. Title 2, Sec. 194).

Petitioner contends that this requirement of Section 194 is jurisdictional in a proceeding against a non-member of the House, and that it was not complied with by the Committee in his case. He offered evidence to show that in its report to the House, the Committee suppressed his prepared statement, his motions to quash his subpoena, and his application to recall certain witnesses for the purpose of cross-examination. This offer was rejected by the Trial Court [J. A. 215, 303-305].

This Court said in *In re Chapman,* 166 U. S. 661, 667:

> "When the facts are reported to the particular House, the question or questions may undoubtedly be withdrawn or modified or the presiding officer directed not to certify."

The matters excluded by the Committee from the consideration of the entire House were substantial. This Court can properly assume that the members of the House of Representatives share with other Americans a desire for fair play. If the Committee's denial of petitioner's request to recall and cross-examine witnesses who had attacked him had been revealed to the members of the entire House, they might well have refused to certify the contempt charges. However, this Court is not required to speculate on what action the House might have taken, once the failure to follow the statutory requirement has been established.

Kwock Jan Fat v. White, 253 U. S. 454, 463.

E. Utilization of Government Employees as Jurors in This Particular Case Involving the House Committee on Un-American Activities as the Governmental Agency Directly Interested in the Prosecution, Constituted Prejudicial Error.

This case presents essentially the same issues with respect to the use of Government employees on the jury as is involved in the case of *Dennis v. United States* (cert. granted June 27, 1949, No. 436). The issue was presented to the Trial Court by motions for change of venue, by challenges for cause directed to Government employees, and by requests for additional peremptory challenges after the exhaustion of those allowed by the Court, all of which the Court denied.

Out of thirty persons on the jury panel from which the trial jury was selected, fifteen were Government employees [J. A. 138-140], six others had immediate members of the family who were Government employees [J. A. 142] and one other had a mother on Government pension [J. A. 143]. The jury as finally constituted included five Government employees, one juror who was receiving a pension from the Government and one whose mother was on a Government pension [J. A. 142, 143, 167-168].

In support of his position, the petitioner showed the predominance of Government employees on jury panels; the interest of the House Committee on Un-American Activities in the prosecution; the public announcements of the Committee that it would seek the discharge of all Government employees whose loyalty was in doubt, including those who expressed sympathetic association with

members of organizations designated as subversive by the Committee; the fact that the Committee had widely publicized its claim that the petitioner was a member of many of the organizations denounced as subversive by the Committee; the existence on the part of Government employees of fear that any action which did not meet the Committee's approval would lead to discharge from Government employment, the fact that this fear was intensified by Executive Order 9835, which was particularly applicable in this case because the petitioner had publicly supported organizations placed upon the outlaw list pursuant to said order; and the fact that prominent persons connected with Government had been pilloried for less sympathetic association with condemned individuals or organizations than might be deemed manifested by a vote of 'not guilty' in petitioner's case [J. A. 13-25].

In such a strained setting can it reasonably be urged that Government employees could dispassionately and impartially sit as jurors on a case wherein the activity of this Committee was involved and was being sharply challenged by a citizen who had long opposed the standards set up by this Committee and who, in his testimony before the Committee on October 27, 1947, had repeatedly criticized it particularly where this testimony was the heart of the criminal contempt case which the Government employee-juror was to pass upon?

The prejudicial effect of the presence of Government employees on the jury was aggravated by the limitations placed upon *voir dire* examination designed to elicit actual

bias. The defense, as distinguished from the prosecution, was required to submit its questions on *voir dire* in writing; many appropriate questions were disallowed; others were modified. Defense counsel was censored for repetition of questions, even where it was done at the request of veniremen. The prospective jurors under interrogation were not placed in the jury box and the physical set up was such that effective observation of the jurors questioned was impossible [J. A. 100-138].

Thus the petitioner was tried by a jury composed largely of Government employees, in a case in which Government employees might well believe that their jobs would be jeopardized if the defendant was acquitted, and without adequate opportunity to determine the actual bias of the jurors. This case presents a situation equally entitled to review as that involved in the case of *Dennis v. United States,* pending before this Court. See also *Crawford v. United States,* 212 U. S. at pages 193-196.

F. The Trial Court Erred in Denying Petitioner's Challenge and Motion to Dismiss the Jury Panel in That (1) the Use of Questionnaire Containing the Question Whether the Prospective Juror Holds Any "Views Opposed to the American Form of Government" Was Improper and Invalidated the Jury Panel, Particularly in the Present Case, and (2) the Petitioner's Right to an Impartial Jury Drawn From a Cross-Section of the Community Was Abrogated by the Establishment of Qualifications for Jury Service Other Than Those Required by Statute and Which Limited the Representative Character of the Jury.

All prospective jurors were required to fill out a questionnaire which included the following question:

> "Have you any views opposed to the American form of government?"

Its purpose was indicated by a Jury Commission as to test "whether a person was a good and lawful citizen" [J. A. 87].

Nowhere in the statute establishing the qualifications for jury service (Title II, Section 1417, of the District of Columbia Code) is there any reference to a person's views, unless it be deemed that the phrase "good and lawful person" found in the statute refers to a person's ideas or beliefs. It is submitted that this phrase is intended to deal with a person's conduct and not his views, and that it was not the intention of Congress to make eligibility for jury service dependent upon a complete and unqualified belief that the American form of government is so perfect as to require no change whatsoever.

It can hardly be doubted that in the City of Washington there are many persons who would hesitate to answer the question concerning his views, and who therefore would either not answer it in the first instance or would fail to return the questionnaire because of the presence of this

question. The fact that the question is apparently made a test for jury service inevitably instills in the minds of the prospective juror the concept that it is his responsibility not merely to sustain the Constitution in accordance with the instructions of the Court, but that a person who does not believe that the present form of government should continue completely unchanged is to be condemned. The prejudicial effect of this question in the instant case, where the charge is that the defendant refused to answer a question as to whether he was or ever had been a member of the Communist Party, cannot be doubted.

Cf. Gideon v. United States (C. C. A. 8th, 1931), 52 F. 2d 427.

For the purpose of determining whether a juror has sufficient "intelligence" to qualify as a juror, the Jury Commission examined the quality of the handwriting on the questionnaires, any striking out of words, other "messy" conditions and any misspelling [J. A. 65-82]. The Jury Commissioner explained "It is merely a question of how I interpret a form as to intelligence and ability to serve on a jury" [J. A. 77].

The Jury Commissioner testified that he knew of no case in which a person in a high economic classification was disqualified because of bad handwriting or because of the manner in which the questionnaire was filled out, except one man whose handwriting indicated he had palsy and who was therefore physically disqualified [J. A. 89-90]. All the persons disqualified because of the Jury Commissioner's interpretation of a form "as to intelligence and ability to serve on a jury" were in the lower economic brackets. In explanation of this circumstance the Jury Commissioner testified that the fact that a man is a "cafeteria worker" or a "houseman" effects the dis-

qualification only "incidentally" and "only indirectly" [J. A. 82-84]; that when eligibility is considered, occupation "is one of the last things I look at in reviewing these cases"; that it is given consideration "finally . . . but not in the initial stages" [J. A. 89-90]. The only "intelligence" requirement for jury service in the District of Columbia is the ability "to read and write and to understand the English language." Yet persons who were obviously able to read, write, and understand were disqualified because they had not met the alleged intelligence standards arbitrarily applied by the Jury Commission.

It may be that minor technical departures from the method of jury selection prescribed by statute should not invalidate a jury panel. However, where the departure is not merely technical but is such that it renders the jury panel less representative than it would be if the statute were followed, the result is prejudicial and it should not be allowed.

Glasser v. United States, 315 U. S. 60, 85;
Thiel v. Southern Pacific Co., 328 U. S. 217.

Nor is it of any significance that the discrimination is allegedly based upon standards of intelligence. The important fact is that persons with relatively similar questionnaires were treated differently solely because of differences in their economic status.

As this Court said, in *Smith v. Texas,* 311 U. S. 128:

> "If there has been discrimination, whether accomplished ingeniously, or ingenuously, the conviction cannot stand."

In this case, the Jury Commissioner did not apply the same standard in determining the qualifications of persons in higher economic brackets that he applied to those in lower economic brackets. Regardless of motive and

whether the system of selection be denominated ingenuous or ingenious, the result is the same — discrimination against those in the lower economic groups—a method of selection contrary to statute and not calculated to obtain a jury truly representative of the community—a method of selection not consistent with our concepts of the democratic process.

The method of jury selection used in the District of Columbia, at the very least, presents a substantial and serious question of constitutional law which should be considered by this Court.

Respectfully submitted,

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FILED

IN THE

Supreme Court of the United States

October Term, 1949

No. 249

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

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The Committee used its powers under Section 121 of Legislative Reorganization Act of 1946 to impose a blacklist against the petitioner and other named individuals, and thereby placed itself above the Constitution and disregarded the elementary requirements of due process of law in that: (1) It usurped the power to legislate confided by the Constitution to the concurrent action of both Houses of Congress and the President; (2) It exercised such power in a manner prohibited even to the entire legislature; (3) It invaded the area delegated exclusively to the judiciary; and (4) It exercised such judicial power in a manner prohibited even to the judiciary 24

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IV.

The statute creating the House Committee on Un-American activities on its face and particularly as construed and applied is unconstitutional in that: (1) It permits investigation of, and as construed and applied has been used to investigate, the content of speech and ideas, an area in which no legislation is possible thereby exceeding the boundaries of legislative power under Article I of the Constitution; (2) It permits the very process of investigation to be used, and as generally construed and applied it has been used, to expose and stigmatize the content of any and all speech and ideas disapproved by the members of the Committee, thereby impeding and placing a burden upon free thought, speech and association in violation of the First, Ninth and Tenth Amendments, and (3) The statute is so vague and ambiguous that, as applied in a criminal case, it violates the First Amendment and the due process clause of the Fifth Amendment..... 25

V.

The trial court committed prejudicial errors and denied petitioner a fair trial under the Sixth Amendment by its rulings, instructions and comments..... 25

A. The Subcommittee before which petitioner appeared was not shown to be a lawfully constituted tribunal, and the trial court committed prejudicial error by reason of its rulings and instructions which prevented the jury from considering this fact in reaching its verdict..... 25

B. The instructions of the court that the defendant, while a witness before the congressional investigators, was required to give a responsive reply and had the right only to state his objections wtihout elaborating or repeating them, were erroneous, confusing and misleading and prejudically affected the substantial rights of the defendant 28

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C. Utilization of government employees as jurors in this particular case involving the House Committee on Un-American activities as the principal prosecuting witness, denied to petitioner a fair trial under the Sixth Amendment 32

D. The trial court erred in denying petitioner's challenge and motion to dismiss the jury panel in that (1) the use of questionnaire containing the question whether the prospective juror holds any "views opposed to the American form of government" was improper and invalidated the jury panel, particularly in the present case, and (2) the defendant's right to an impartial jury drawn from a cross-section of the community was abrogated by the establishment of qualifications for jury service other than those required by statute and which limited the representative character of the jury..... 32

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IN THE

Supreme Court of the United States

October Term, 1949.

No. .....

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Dalton Trumbo, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia, rendered on June 13, 1949. On June 16, 1949, petitioner moved the Court of Appeals for an extension of time to July 5, .1949, to file a petition for rehearing. This motion was denied on June 23, 1949. On motion of petitioner, he was granted an extension of 30 days to August 12, 1949, in which to file this petition in this Court.

The petitioner was indicted under Rev. Statutes Section 102, as amended by Chapter 594, Act of June 22, 1938, 52 Stat. 942, U. S. C., Title II, sec. 192 [J. A. 9];[1] was found guilty by a jury verdict on the 5th day of May, 1948 [J. A. 28]; and thereafter made a motion for a new trial which was denied [J. A. 30-33]; on the 21st day of May, 1949, petitioner was sentenced to one year in jail and fined $1,000 [J. A. 29].

The petitioner perfected an appeal to the United States Court of Appeals, for the District of Columbia, which appeal (No. 9873) resulted in the judgment of affirmance, to which this petition is directed.

Statement of Matter Involved.

The first count of the indictment alleged in substance that the petitioner Trumbo, a novelist and screen writer (Vol. 25, Who's Who 2509), having appeared before the House Committee on Un-American Activities on October 28, 1947,[2] refused to answer a question put to him by the Committee, to wit, "Are you a member of the Screen Writers' Guild?", a question which the indictment alleged was pertinent to the matter under inquiry. The second count of the indictment was the same as the first, except that the question involved was, "Are you now, or have you ever been, a member of the Communist Party?"

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[1]Pursuant to paragraph 7 of the Supreme Court Rule 38, there are filed herewith copies of the joint appendix printed for use in the United States Court of Appeal, for the District of Columbia. References "J. A." are to pages of that printed record.

[2]The said hearings were officially reported; the full designation of the said hearings is: "Hearings Regarding The Communist Infiltration of the Motion Picture Industry Before the Committee on Un-American Activities House of Representatives, Eighth Congress, First Session, Public Law 601." Reference to the hearings hereafter will be designated as "[Comm. Tr. .....]."

Petitioner Trumbo testified before the Committee on October 28, 1947, one day following a similar appearance by John Howard Lawson, whose companion case (*Lawson v. U. S.*, No. 9872, U. S. C. A.—D. C.) is the subject matter of a petition for certiorari filed simultaneously with this petition and referred to hereafter as the Lawson petition.

Since the events of the first week of the Committee hearing were naturally identical, petitioner Trumbo will merely incorporate and not repeat pages 3 to 5 of the Lawson petition.

On the morning of October 28, 1947, when petitioner Trumbo was called, three members of the Committee, Congressman Thomas, Chairman, of New Jersey, Congressman Vail of Illinois, and Congressman McDowell of Pennsylvania, were present. The Chairman opened the hearing on that day by saying: "The record will show that a sub-committee is sitting and those present are Mr. McDowell, Mr. Vail, and Mr. Thomas" [J. A. 242]. After being sworn petitioner asked and was denied leave to read a statement, to introduce statements from twenty persons, including General Arnold of the Army Air Forces, and to submit scripts which he had written. He was then asked whether he was a member of the Screen Writers' Guild. In reply petitioner pointed to the invasion of the rights of secrecy of union membership lists and asserted that the objective of the Committee was to identify him with the Guild and then with the Communist Party, seeking thereby to destroy the Guild. Then the questioning proceeded in the following manner:

"The Chairman: I will ask you the question—

Mr. Trumbo: You ask me.

The Chairman: Are you a member of the Screen Writers' Guild?

Mr. Trumbo: I repeat:

The Chairman (pounding gavel): Excuse the witness—

Mr. Stripling: Just a moment, Mr. Chairman—

Mr. Trumbo: Am I excused?

Mr. Stripling: I have more questions—

Mr. Trumbo: Am I excused, or not?

The Chairman: No; just a minute. The chief investigator wants to ask some questions.

Mr. Stripling: Just a moment. I have some other questions, Mr. Trumbo, that I would like to ask you. Are you now, or have you ever been a member of the Communist Party?

Mr. Trumbo: Mr. Chairman, first, I should like to know whether the quality of my last answer was acceptable since I am still on the stand?

The Chairman: That hasn't got anything to do with your answer to the last question.

Mr. Trumbo: I see.

The Chairman: This is a new question, now.

Mr. Trumbo: I see.

Mr. Stripling, you must have some reason for asking this question—

Mr. McDowell: Yes, we do.

Mr. Trumbo: You do.

I understand that members of the press have been given an alleged Communist Party card belonging to me—is that true?

Mr. Stripling: That is not true.

The Chairman: You are not asking the question—

Mr. Trumbo: I was.

The Chairman: The chief investigator is asking the questions.

Mr. Trumbo: I beg your pardon, sir.

The Chairman: Are you or have you ever been a member of the Communist Party?

Mr. Trumbo: I believe I have the right to be confronted with any evidence which supports this question. I should like to see what you have.[2]

Mr. Chairman: Oh, well, you would?

Mr. Trumbo: Yes.

The Chairman: Well, you will, pretty soon.

(Laughter and applause.)

The Chairman (pounding gavel): The witness is excused. Impossible" [J. A. 388-90].

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[2]When the committee's chief investigator was questioned at the trial concerning his failure to produce the requested evidence, the following occurred:

"Q. I ask you, Mr. Stripling, whether you presented the evidence which you had to Mr. Trumbo at the time he requested it? A. He didn't request it of me.

Q. The Chairman said: 'The chief investigator is asking the questions.'

Did you, whether he requested the evidence of you or of the chairman, present him with the evidence which you had, when he requested that the evidence concerning Communist affiliation be presented to him? A. Well, he didn't give us a chance to present any evidence.

Q. Mr. Trumbo said: 'I believe I have the right to be confronted with any evidence which supports this question. I should like to see what you have.'

My question to you, sir, is did you at that time, even though his request was addressed to the Chairman, present him with the evidence you had about the Communist Party affiliation? A. This all occurred in a very short period.

Q. Can you answer yes or no? A. I didn't submit any evidence at that time. I didn't have time to submit any evidence.

Q. Then, is the answer, 'No, sir?' A. No; absolutely."

With this preliminary statement as to what occurred at the hearings, as shown at the trial, petitioner turns now directly to a consideration of the court proceedings.

Prior to the trial petitioner filed a motion to dismiss the indictment and a brief in support thereof. The motion was denied [J. A. 6, 11]. The only evidence offered by the government to prove the creation of a subcommittee was the testimony of Congressman John McDowell, who was allowed to read the following from the record of the Committee hearing on October 28, 1947:

> "The Chairman: The meeting will come to order. The record will show that a subcommittee is sitting and those present are Mr. McDowell, Mr. Vail and Mr. Thomas" [J. A. 381].

Government counsel conceded that all of its evidence as to the creation of the subcommittee was on the printed pages of the transcript of the committee's hearings as related by Congressman McDowell [J. A. 57]. Petitioner thereupon asked the Court to dismiss the case before trial [J. A. 70], but the motion was not granted by the Court [J. A. 71]. Instead the Court adopted the government's position, over objection, that the question of the chairman's power to appoint a subcommittee was solely a matter of law [J. A. 358-9]. Lewis Deschler, Parliamentarian of the House of Representatives, was called as a government witness, before the Court sitting without the jury [J. A. 360] and was allowed, over objections, to state his conclusion that "by immemorial custom subcommittees have always been appointed by the chairman of the full committee," and that "after an appointment has been made it is usually noted on the minutes of the committee" [J. A. 362].

On cross-examination the following testimony was elicited from Mr. Deschler:

> "Q. A Chairman appoints a subcommittee, the committee either tacitly does not object when it is brought to the attention of the full committee, or what the chairman does is subsequently ratified by the full committee? A. I assume after the chairman had designated or appointed a subcommittee, subsequently the full committee could take it under advisement, if they agreed to do so; but unless it is challenged, the chairman of the committee has always had the right to appoint a subcommittee" [J. A. 364].

On redirect, in answer to the question:

> "In other words, if they tacitly approved it, it is all right?"

The witness answered:

> "Oh, surely. If no question is raised in the full committee, why, they acquiesced in the action of the chairman."

The Court denied petitioner's motion to strike all of the testimony of the witness Deschler upon the ground that it was entirely concerned with custom and usage and in conflict with the written law [J. A. 375].

In the absence of the jury, subject to objection, the government also introduced testimony of Congressman McDowell that on November 17, 1947, twenty days after petitioner had appeared before the so-called subcommittee, a meeting of the full Committee was held and was attended by seven members. The witness testified that at that time the seven members voted unanimously for a resolution citing petitioner for contempt and reporting the same to

the House of Representatives. The witness testified that at that meeting, which was executive, no objection was made by any member present "to either the formation of the committee that heard Trumbo or the acts of the subcommittee that heard Trumbo" [J. A. 428].

Following receipt of this testimony the Court ruled that the chairman of the Committee had authority to appoint a subcommittee [J. A. 441].

Later, the Court charged the jury as follows:

> "It is also proper for me to advise you that the chairman of this committee had the right and authority to appoint a subcommittee" [J. A. 545].

This charge was specifically objected to [J. A. 548-49-50], and the Court refused to give petitioner's requested instructions 37 to 48, inclusive [J. A. 566-9], which stated that the Committee could act only through a quorum or through a subcommittee established, authorized or approved by a quorum of the full Committee. Objections by petitioner that such testimony, which was presented to the Court alone, should be adduced before the jury and that, in any event, it amounted to a mere conclusion as to the legal validity of the subcommittee, were overruled [J. A. 240-44].

Certain additional proof on the issue of blacklisting was available at this petitioner's trial which was not available in the same form in Lawson's trial. This came about as follows:

During this trial Congressman J. Parnell Thomas was ill; his deposition was taken and then read to the Court [see J. A. 319-49]. In that deposition, Congressman Thomas testified that the following among other matters, had oc-

curred at the Committee hearing concerning petitioner Trumbo shortly before he testified:

"Mr. Wood: We have tried to figure out why they do it—why they take the abuse and give the money away they do. We can't figure it out, except that maybe they think if anything happens they are going to be commissars here—they are going to be the executives of the studios.

"Some of them, I think, want to be intellectuals. I think they have different reasons; but we cannot quite figure out how they can dominate these people, Americans, and make them do the things they do. There are some of them back there now" [J. A. 334].

Chairman Thomas of the Committee, then said:

"We will take care of them when their turn comes" [J. A. 334].

In the deposition given by Chairman Thomas, he testified:

"Q. Who were you referring to by 'them' in your statement, when Mr. Wood said, 'There are some of them back there now? A. * * * I would say, without looking back, that I am probably referring to the witnesses who had been called and who were in the room when Mr. Samuel Grosvenor Wood was testifying.

Q. That included Mr. Dalton Trumbo, did it not? A. It did.

Q. Did you ever call upon the Hollywood motion picture producers to clean out their house? A. Yes; many times, just as I would call upon any other industry that had communists in it, to clean their house.

Q. *By that you mean, sir, to have them discharged from their jobs?* A. *Exactly.*" (Emphasis supplied.) [J. A. 335-6.]

The trial court refused to admit this or any other portion of the deposition of Chairman Thomas to show that the governmental power of the Committee was used to effectuate the discharge of petitioner; nor did the Court admit it on the question of pertinency tried by the Court [J. A. 349], nor on the issues submitted to the jury [J. A. 475-78].

Robert E. Stripling, the clerk and chief investigator of the Committee, testified that counsel at the motion picture hearings had on numerous occasions requested the right to cross-examine witnesses, all of which requests were denied [J. A. 449-457].[8] Cross-examination to establish that the witness Stripling, while acting on behalf of the Committee, had called for the discharge of individuals employed in the motion picture industry was ruled out by the trial court [J. A. 457-9].

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[8] "Q. (By Mr. Houston): Did you give Mr. Trumbo or his counsel the right to cross-examine Mr. Macaulay after that statement was made? A. (By Mr. Vail): No, sir.

Q. Did you give Mr. Trumbo or his counsel an opportunity to examine Mr. Wood after Mr. Wood's statement was made, that you have just given us? A. No, sir.

Q. Did Mr. Trumbo or his counsel ever ask for an opportunity to cross-examine Mr. Macaulay or Mr. Wood on the testimony? A. I would have to check.

Q. All right. Will you please, then, check at page 289?

The Court: Isn't this repetition?

Mr. Houston: Yes, it is repetition except as to this witness. He has just brought that out. I think it is very important.

The Court: All right. Call his attention to the place.

By Mr. Houston: Q. Page 289, where Mr. Crum says: 'I ask you to bring back and permit us to cross-examine the witnesses Adolph Menjou, Fred Niblo, John Charles Moffitt, Richard Macaulay, Rupert Hughes, Sam Wood, Ayn Rand,' et cetera. You heard that request made? A. Yes, sir.

Q. Was that granted or denied? A. It was denied." [J. A. 494].

For the limited purpose of showing petitioner's state of mind while a witness before the Committee, evidence was allowed by the Court showing that the Committee had denied to petitioner the right of cross-examination and had refused to comply with his request that he be confronted with the evidence against him [J. A. 395-409; 461]; for the same limited purpose the Court allowed petitioner to adduce evidence showing that the Committee had utilized its power as an official agency of government to effectuate the discharge of the petitioner and his blacklisting in the motion picture industry. However, this evidence was not allowed as proof of the fact which it so clearly showed—namely, that the Committee was acting in excess of the lawful bounds of its power; instead the Court instructed the jury that it was not to concern itself as to whether the Committee "conducted its hearings in a fair or unfair manner; nor whether or not certain members of this Committee or its chief investigator sought to blacklist or cause the discharge of this defendant by his employers" [J. A. 543-4].

The Court further quashed *subpoenas duces tecum* designed, among other things, to secure Committee records pertaining to the same subject [J. A. 508-18].

In addition, over petitioner's objections, the Court instructed the jury that it was defendant's duty to answer the questions and, in effect, that the only issue was whether he had given a responsive reply [J. A. 544-9]. The Court instructed the jury that petitioner had the right while a witness to state and make known to the sub-

committee any objection he might have to answering questions; however, the Court went on to instruct the jury as follows:

> "* * * but (he) did not have the right to do more than to state and make known his objections. He did not have the right to insist upon any elaboration of his objections or repeatedly to state his objections instead of answering the questions" [J. A. 547].

The Court rejected petitioner's instructions, which were predicated upon the proposition that any procedure which inflicts punishment not based upon a previous law and without the safeguards of a procedural trial is one out Constitution and laws will neither sanction nor tolerate. [Defendant's request for instructions 15, 16, 17, 17a, 17b, 21, 22, 23, 24, 25, 25a, 25b, 26a, 79, 80, 81, 82, B, C, and D; J. A. 560, 562-4, 574-7.]

On the questions of pertinency, and over the petitioner's objections on the ground of hearsay, the government read to the trial court, sitting without a jury, certain testimony given before the Committee during its hearings on October 20 and 23, 1947, consisting solely of the bare conclusions of two witnesses that Dalton Trumbo was a Communist and of one witness that the Screen Writers' Guild was Communist controlled [J. A. 245-252]. This being the only government evidence on the point, the petitioner moved for an acquittal on the grounds that pertinency had not been established, which motion the Court denied [J. A. 260-1].

At trial petitioner's cross-examination and evidence on pertinency established some additional facts, the substance of which follows: The members of the Committee were certain that they possessed the evidence concerning petitioner's political and trade union affiliations before the questions were propounded to him on October 28, 1947, and they would not have believed him if he had denied such affiliation [J. A. 262-5, 254-6, 325, 338, 456; Committee Hearings p. 342]. At the committee hearings prior to petitioner's appearance, all members of the Committee present had publicly called for the discharge of all persons in the industry, including the defendant, alleged to be members of the Communist Party [J. A. 269-286]. It appeared that the discharge of such persons was the primary purpose of the motion picture hearing [J. A. 283]; and it further appeared that the Screen Writers' Guild was a lawful trade union; that the Guild had been recognized by the National Labor Relations Board as a labor organization certified to represent screen writers; that a rival organization known as the Motion Picture Alliance had carried on a constant struggle against the Screen Writers' Guild; that one of the principal purposes of the motion picture hearings conducted by the Committee was to aid the rival organization in destroying the Screen Writers' Guild; that the witnesses whose testimony the Committee relied on to establish the pertinency of the questions herein were members of that rival organization; that long before the hearings and continuously thereafter the Screen Writers' Guild had

asserted that its membership lists should be held inviolate and secret because of the possibility of discharge of its members, and that compulsory disclosure under oath was in violation of the law and well established public policy [J. A. 297-304].

Through a government official in the field of labor relations for ten years [J. A. 304], petitioner offered and the Court refused to permit proof that the inviolability of trade union membership was a matter of established governmental policy at the time when the inquiries were propounded to petitioner by the Committee [J. A. 304-314].

The trial court held as a matter of law that the two questions covered by the indictment were pertinent to the inquiry [J. A. 351].

The summaries of the offers of proof set forth in the *Lawson* petition are equally applicable here and they are therefore incorporated by reference. The offers of proof relating to blacklisting are set forth at pages 9 to 10; those relating to censorship at pages 11 to 12; those relating to the Committee's use of its hearings and powers to conduct an unlimited investigation into the content of speech and ideas, designed to impede and resulting in the impediment of free speech and association at pages 12 to 14; those relating to denial of due process of law at pages 14 to 15; those relating to the existence of any "subversive" or "un-American" propaganda in motion pictures and the possibility of writers' injecting any such "propaganda" into motion pictures are set forth at pages 16 to 17 [see also J. A. 291-6].

In addition the Court denied petitioner's offer to prove through Louis B. Mayer, executive head of the Metro-Goldwyn-Mayer Studios that he had been visited by two special investigators of the Committee in the summer of 1947; that he had asked them to point out any subversiveness in motion pictures and they were unable to do so; that they had brought up the name of the petitioner Trumbo and told the witness to "wake up" and "clean house of persons suspected of communistic tendencies." The offer included testimony that in his forty-one years in the motion picture industry this witness had never seen, according to any reasonable definition of the term "subversive," a subversive line, script, play or scene in any motion picture [J. A. 442-9].

The petitioner then offered and the Court refused to admit all the scripts written by him to show that they contained no subversive material, by any reasonable definition, of any kind [J. A. 315-318, 497-500].

Prior to and at the outset of the trial petitioner moved to transfer the cause to another district for trial on the ground that juries in the District of Columbia contain many government employees and their relatives and that with such a jury, it was impossible to have a fair trial in this particular cause wherein the principal prosecution agency was the House Committee on Un-American Activities, which Committee exercised meaningful control and authority over the jobs and the political views of the government employees and their near relatives. The motions to transfer to another district for trial were denied [J. A. 17-28; J. A. 6].

Prior to the final selection of the jury, petitioner moved to excuse for cause from the trial jury selected all those jurors who were government employees and this motion was denied [J. A. 218]; as finally constituted, the trial jury in the case was composed of eight persons employed by the government [J. A. 200-233]; the petitioner's request for additional peremptory challenges so that he might attempt to get non-government employees into the jury box was likewise denied [J. A. 232].

Immediately prior to the trial a challenge to the array and a motion to dismiss the jury panel was made on the ground that it was selected in a manner neither designed nor calculated to obtain a representative cross-section of the community; in support thereof, petitioner proved that one of the qualifications for jury service in the District of Columbia is an affirmative response to the question "Have you any views opposed to the American form of government?" [J. A. 177], and that one prospective juror had been classified as "off-color" because he stated in answer to this question that he was opposed to "taxation without representation" in the District of Columbia [J. A. 177]; in addition, petitioner proved the jury commissioner examined handwriting on questionnaires returned by talesmen to determine their "intelligence" [J. A. 182-3], and that persons of low income groups with "poor handwriting" were disqualified because such poor handwriting disclosed a lack of "intelligence" in members of such groups, the while those in higher income brackets who likewise had "poor handwriting" were accepted for jury service [J. A. 197]; this motion also was denied [J. A. 199].

Statement as to Jurisdiction.

The judgment of the Court of Appeals was entered on June 13, 1949.

The jurisdiction of this Court is based on the Act of June 25, 1948 Chapter 646 (62 Stats. 869) U. S. C., Title 28, Section 1254, Subsection 1, which provides that a writ of certiorari may issue to the Court of Appeals of the District of Columbia "after rendition of judgment or decree."

Statutes Involved

The statutes involved are the same as those set forth in the companion petition for John Howard Lawson and are incorporated herein by reference.

Questions Presented.

The questions presented are in all substantial respects identical with the questions presented in the companion Lawson petition.

A somewhat different situation occurring at the trial, however, requires the restatement of Question No. VIII as follows:

Did the Court commit prejudicial error affecting the substantial rights of the petitioner by instructing the jury that the petitioner while on the witness stand before the Congressional investigators was, (1) required to give a responsive reply to questions, and (2) required to state his objections without however elaborating upon them or repeating them?

In addition, this petition presents one further question as follows: Can the Committee as an agency of government use its official power to compel a witness to answer the following question: "Are you a member of the Screen Writers' Guild?"

Reasons for Granting Writ.

The reasons set forth for the granting of the writ in the *Lawson* case are equally applicable here and are therefore incorporated by reference.

In addition, however, this case presents to the Court, for the first time, the issue whether the Committee may utilize its official power as an agency of government to compel a witness before it to disclose his trade union affiliations. History thus repeats itself—but this time only a few years after it has first occurred in Nazi Germany and shocked the world. Always the first question is: Are you a Communist? Official power to ask that question always presumes equal power to ask the next question: Are you a trade unionist?, and then the next: Are you a Jew?, and the next: Are you a practicing Catholic?, and the next: Are you a devout Methodist?

This sequence inexorably follows if the power is once conceded, for thought control is either all inclusive, or it is non-existent. Once a single individual is required to account to government officials for any one of his beliefs or affiliations, then all of his beliefs and affiliations are equally subject to complete accounting before the inquisitor.

The true issue here is not only whether the Committee may call upon the judiciary to imprison the petitioner on the charge that he refused to disclose his trade union membership; it is in addition whether this agency of government, upon the delusive pretext that it was investigating the "dangerous" idea labeled "Communism," may call before it every trade unionist in America and compulsorily require an answer to the same interrogatory.

This, we submit, a question of moment; it is one not heretofore answered by this Court.

I.

The Committee's Utilization of Congressional Power, as an Agency of Government, to Compel Disclosure of Private Political Opinion and Association (Including Union Membership) Is Forbidden: (A) By the First, Fourth and Fifth Amendments as Unwarranted Invasions Into the Private Rights of Individuals, and (B) By the Ninth and Tenth Amendments as Unwarranted Invasion Into the Area of Governmental Powers Reserved Exclusively to the Sovereign People.

Everything that was said under this heading in the *Lawson* case is applicable here. In this case, however, the petitioner was asked to disclose his trade union affiliation, as well as his political associations.

Labor organizations are formed and exist for the advancement of the ideas and programs of laboring men and women (*N. L. R. B. v. Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Thornhill v. Alabama*, 310 U. S. 88). The compulsory disclosure of membership in labor organizations is, therefore, for reasons set forth in the Lawson petition, also an interference with the freedom of speech and association and other constitutional rights guaranteed by the First, Fourth, Fifth, Ninth and Tenth Amendments, and Article I of the Constitution.

The particular purposes of the trade union have become so vital to the welfare of the whole nation, that the right to belong to it and to participate in its activities has received very precise judicial and statutory sanction. (*Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418. Also *Alaska S. S. Co. v. International Longshoremen's Assn.*, 236 Fed. 964, 969, 970 (D. C., W. D., Wash).)

This right of the free association of labor became so indispensable to our highly industrialized economy that it was incorporated into a whole series of labor laws enacted by Congress. In 1932, this concept was formalized in the Norris-LaGuardia Act. Section 102 of that Act declaring the national labor policy, stated:

> "It is necessary that he (labor) have full freedom of association, self-organization, etc."

The National Labor Relations Act "by protecting the exercise by workers of full freedom of association" (Title 29, Sec. 151, U. S. C. A.) carried forward this policy.

Despite other material changes, the Labor-Management Relations Act of 1947 leaves intact as a matter of policy encouragement for the freedom of association and self-organization of workers (Chapter 120, Public Law 101).

These labor acts did not create for labor the right of free association. On the contrary, they were enacted in order that the fundamental character of the right might be safeguarded.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33, 34;

Hague v. Committee for Industrial Organization, 307 U. S. 496;

National Labor Relations Board v. American Pearl Button Co., 149 F. 2d 311.

The protection of the constitutional rights of individuals from compulsory disclosure of their trade union membership was found to be so necessary that it was formalized as part of our national policy. For the past 13 years acts of Congress have consistently barred the compulsory revealing of any trade union membership. The National Labor Relations Act, as amended, provides that the col-

lective bargaining agent of the employees may be determined by "secret ballot." (29 U. S. C. A., 159 c (1).) This national policy was followed by a host of similar acts of state legislatures, such as Pennsylvania, New York, Wisconsin, Massachusetts. The "yellow-dog" contract, and "black-list" which had been, for many years, important employer methods of compulsory disclosure of union affiliation, effective in destroying trade unions, were finally outlawed as part of a national labor policy (*Grower-Shipper Vegetable Association,* 15 N. L. R. B. 39). Even during the critical war period, the national labor policy of protecting rights of individuals from disclosure of their union membership was not abrogated. In fact, the War Labor Disputes Act (1943) incorporated and followed the policies of the Norris-LaGuardia Act and the National Labor Relations Act (*U. S. v. United Mine Workers of America,* 330 U. S. 258).

The Labor-Management Relations Act, of 1947, Chapter 20, Public Law 101, did not change this policy against compulsory disclosure of trade union affiliation (Sec. 39, U. S. C. A. 158) of the National Labor Relations Act. (*Texarkana Bus Co. v. N. L. R. B.,* 119 F. 2d 480; *N. L. R. B. v. Harris-Woodson Co.,* 162 F. 2d 97.)

The House Committee on Un-American Activities, by attempting to compel these defendants to reveal their trade union membership, has completely negated this national labor policy, and seeks to enforce criminal sanctions against the defendants for their refusal to declare their trade union affiliations. If the policy of the Committee to require such disclosure is upheld, our sound national labor policy would be completely frustrated and negated. It would be a warning to the millions of trade union members that their affiliation could become a matter of

public record at the will of this Committee, and that the protection given to them by the First Amendment of the Constitution and the national labor policy adopted by Congress, which merely safeguarded the constitutional right, was a mere formality. It would be a case of the government violating both the Constitution and its own declared policy.

The causal relationship between the disclosure demanded by the Committee and the resulting burden on speech here urged is closely analogous to interference with workmen's self-organization effected by employer interrogation as to union affiliation and sympathy. Employers hostile to union organization do not collect information concerning their employees' union sympathies for simple statistical purposes. They obtain these facts for the very reason that the exposure entailed will deter both the employees who make the disclosures and their fellows from supporting the union and its program. Neither this Court nor the courts of appeal have had any difficulty in perceiving that this exposure, especially in the context of employer opposition to the union, constitutes a substantial interference with, and restraint and coercion of, the exercise of the workmen's right of self-organization (*H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514; *Norfolk Southern Bus Corp. v. N. L. R. B.* (4th Cir.), 159 F. 2d 516; cer. den. 330 U. S. 844).

In the case at bar no less immediate a causal relationship obtains between exposure of union affiliations and interference with the exercise of the rights guaranteed in the First Amendemnt. The question concerned was asked as part of the Committee's plan to expose as "un-American," "subversive" and "Communistic" certain individuals and organizations, including the Screen Writers Guild, in

the motion picture industry. The disclosures were commanded in a context of official condemnation of organizations and individuals so labeled, emanating not only from the Committee but also from the President, the Attorney General, the Secretary of State and many others (see *Barsky v. U. S.*, 167 F. 2d 241, 247, notes 18, 19 and 20). If the exposure of union affiliation to a hostile employer interferes with the exercise of the right of self-organization by the disclosing workman and by his fellows, *a fortiori* its exposure, as well as the exposure of political affiliation to a hostile government interferes with the exercise of the First Amendment rights by both the individual interrogated and the community generally.

The character of the limitation on the freedom presented in the case at bar, even in a much less burdensome form, is one which this Court has unequivocally condemned. In the case of *Thomas v. Collins*, 323 U. S. 516, it was held that a statute providing for compulsory disclosure by a labor organizer of the name of the cause he supports or the organization with which he is affiliated is a limitation invalid *per se*, even though no area of discretion is reserved to the administering officer to approve or disapprove the speech of the individual or organization concerned and the registration be a purely ministerial act undertaken for informational purposes only. While such a restraint may be thought nominal in burden, it is invalid "as a matter of principle" by reason of the fact that it becomes operative only because of and only upon the exercise of the First Amendment freedoms. No less a limitation upon the power of government should be here imposed.

To hold that Congress can do with its investigatory powers, which are merely implied, what it cannot do with

its legislative powers would be to hold that the implied power is greater than the expressed power from which it stems. This conclusion the courts have rejected (*Kilbourn v. Thompson,* 103 U. S. 168; *Boyd v. U. S.,* 116 U. S. 616, 630).

II.

This Particular Inquiry Into the Hollywood Motion Picture Industry Lay Entirely Outside the Lawful Bounds of the Power of the House Committee Because It Constituted a Censorship of the Content of Motion Pictures and Thereby Violated the First Amendment.

Petitioner adopts the argument made on this point in the *Lawson* case.

III.

The Committee Used Its Powers Under Section 121 of Legislative Reorganization Act of 1946 to Impose a Blacklist Against the Petitioner and Other Named Individuals, and Thereby Placed Itself Above the Constitution and Disregarded the Elementary Requirements of Due Process of Law in That: (1) It Usurped the Power to Legislate Confided by the Constitution to the Concurrent Action of Both Houses of Congress and the President; (2) It Exercised Such Power in a Manner Prohibited Even to the Entire Legislature; (3) It Invaded the Area Delegated Exclusively to the Judiciary; and (4) It Exercised Such Judicial Power in a Manner Prohibited Even to the Judiciary.

Petitioner adopts the argument made on this point in the *Lawson* case.

IV.

The Statute Creating the House Committee on Un-American Activities on Its Face and Particularly as Construed and Applied Is Unconstitutional in That (1) It Permits Investigation of, and as Construed and Applied Has Been Used to Investigate, the Content of Speech and Ideas, an Area in Which No Legislation Is Possible Thereby Exceeding the Boundaries of Legislative Power Under Article I of the Constitution, (2) It Permits the Very Process of Investigation to Be Used, and as Generally Construed and Applied It Has Been Used, to Expose and Stigmatize the Content of Any and All Speech and Ideas Disapproved by the Members of the Committee, Thereby Impeding and Placing a Burden Upon Free Thought, Speech and Association in Violation of the First, Ninth and Tenth Amendments, and (3) The Statute Is so Vague and Ambiguous That, as Applied in a Criminal Case, It Violates the First Amendment and the Due Process Clause of the Fifth Amendment.

Petitioner adopts the argument made on this point in the *Lawson* case.

V.

The Trial Court Committed Prejudicial Errors and Denied Petitioner a Fair Trial Under the Sixth Amendment by Its Rulings, Instructions and Comments.

A. The Subcommittee Before Which Petitioner Appeared Was Not Shown to Be a Lawfully Constituted Tribunal, and the Trial Court Committed Prejudicial Error by Reason of Its Rulings and Instructions Which Prevented the Jury From Considering This Fact in Reaching Its Verdict.

Here, as in *Christoffel v. U. S.* (No. 528, decided June 27, 1949), the question of the existence of a lawfully

constituted tribunal was taken away from the jury (see argument in *Lawson's* petition pp. 88-94).

There are, in addition, three matters in this case which require consideration.

Here, the chairman in his oral announcement, claimed by the government to have been the appointment of a subcommittee, did not designate the members of the subcommittee which he allegedly appointed. The words used by the chairman were:

> "The record will show that a subcommittee is sitting and those present are Mr. McDowell, Mr. Vail and Mr. Thomas."

There is nothing in this language to indicate whether or not this is the full membership of the subcommittee or what number of members were to constitute the subcommittee. Since the numerical size of the subcommittee has to be left to guesswork, it is just as reasonable to guess that it was a seven-member body as a three-member body. It is obvious that if the subcommittee was one of seven members, a quorum was not present, only three members being in attendance. The existence of essential facts cannot be left to assumptions in a criminal case.

Furthermore, in this case, the Government, apparently recognizing the weakness of its showing in the *Lawson* case, adopted a new tactic in proceeding against Trumbo by the introduction of evidence purportedly showing an attempted ratification by the full Committee of the chairman's action in appointing the subcommittee.

This undoubtedly was an attempt to follow the procedure adopted in *Myers v. U. S.*, No. 9797. However, in that case, the Committee's ratification of the chair-

man's act in appointing the subcommittee, took place before General Myers testified before that subcommittee [J. A. 371-3]. Here, the ratification, if any, took place after the defendant Trumbo had testified. If the Committee was not validly constituted at the time defendant Trumbo testified before it, no crime could be charged. Defendant Trumbo's alleged offense took place on October 28, 1947. Action taken by the full Committee on November 17, 1947, twenty days later, obviously could not breathe life into a tribunal that did not have previous legal existence. A parallel situation would be one where a witness swore falsely before a person purporting to be a notary but whose commission had not yet become effective (*Fanchion v. State,* 104 Tex. Cr. 78, 282 S. W. 597).

Ratification by a full Committee is obviously proper as to legislative acts and forms a useful procedural shortcut, but procedural shortcuts are not available to make criminal acts which were innocent when committed. Such rules of legislative convenience cannot be permitted to affect the rights and liberties of non-members of legislative bodies (*U. S. v. Smith,* 286 U. S. 6, 33). If the defendant Trumbo was not testifying before a valid subcommittee on the day he appeared, his act cannot be made criminal later by the ratification process. To do so would be violative of Article I, Section 9, Clause 3 of the Constitution of the United States, as an *ex post facto* procedure.

The third additional matter to be considered is the testimony of the Parliamentarian of the House of Representatives. It is not necessary to determine the inadmissibility of that testimony, or any error involved in presenting it to the Court alone, rather than to the jury. For this testimony merely confirms the contention of pe-

titioner that, at the very least, the act of a chairman in appointing a subcommittee requires ratification, tacit or otherwise, in order to establish its validity. Here as noted above, the only evidence of ratification related to a time after petitioner testified before the Committee, and it was, therefore, immaterial here.

B. The Instructions of the Court That the Defendant, While a Witness Before the Congressional Investigators, Was Required to Give a Responsive Reply and Had the Right Only to State His Objections Without Elaborating or Repeating Them, Were Erroneous, Confusing and Misleading and Prejudicially Affected the Substantial Rights of the Defendant.

The Court gave the following charge to the jury:

> "An answer means a responsive reply; it does not mean any kind of a reply that a person desires to give. So a witness may refuse to answer by making an unresponsive reply or statement when he does so not accidentally but intentionally, knowingly, with full understanding of the question, and after being given a reasonable opportunity to answer responsively. His motives, as distinguished from his intent, in making the statement may not be considered." [J. A. 546-547].

Thereafter the Court went on to charge:

> "I might state that the defendant had the right—I instruct you that the defendant had the right—to state and make known to the subcommittee any objections he might have to answer questions, but did not have the right to do more than to state and make known his objections. He did not have the right to insist upon any elaboration of his objections or re-

peatedly to state his objections instead of answering the questions" [J. A. 547].[4]

These charges may be clear to lawyers. But to a jury of laymen they are patently confusing. Nowhere is there a definition of what constitutes a responsive reply. The subject of responsiveness or non-responsiveness is not free from doubt, even to the bench and bar (see Wigmore—Third Edition, paragraph 785). But although the non-responsiveness of a purported reply was made the touchstone of guilt, no standard for determining such a reply characteristic was given to the jury.

To add to this error, and as part of its charge relative to the issue of responsiveness, the Court charged the jury:

> "His motives, as distinguished from his intent, in making the statement may not be considered."

But here again no judicial guidance was given to the jury by which it could distinguish the motives which could not be considered, from the intent which the jury was required to consider, and ultimately adjudge. The line separating motive from intent is too evanescent to be recognized readily without considerable judicial light. Unless very carefully delineated, motive and intent are absolutely indistinguishable to the laity. But nothing was here done to avoid this confusion concerning the sole and central issue of fact which the jury was called upon to resolve. This was reversible error. (See *Agnew v. U. S.*, 165 U. S. 36.)

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[4]Defendant's requested instructions, numbered 59 through 69, inclusive [J. A. 571-2] correctly embraced the law on these subjects, but each such instruction was refused by the Court.

Following such confusing charges, the Court then directed the jury that the defendant could only state his objections to the Congressional investigators, but could neither elaborate nor repeat them. The evidence, however, did show that Mr. Trumbo repeated his objections and elaborated them. Thus the Court, for all meaningful purposes, directed the jury to find the defendant guilty. This charge took from the jury the basic factual question—was there proof beyond a reasonable doubt, and under all the circumstances shown, of a deliberate and intentional refusal to answer—by directing the jury that Mr. Trumbo was committing the offense when he repeated his objections and elaborated upon them.

Neither statute nor case law condemns the repetition or elaboration of an objection. It is possible that such repetition and elaboration of objection may under some circumstances be evidence of a deliberate and intentional refusal. They are not, however, conclusive evidence of it. This is particularly true in the case at bar.[5]

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[5]For here it appears that Mr. Trumbo had sought to present a written statement outlining his position to the Congressional investigators; that this opportunity was denied to him; that he was threatened by the Chairman, J. Parnell Thomas, at the very onset of the inquiry as follows:

> "As a witness, if you conduct yourself like the first witness yesterday, you won't be given the privilege of being a witness before a Committee of Congress, before this Committee of Congress." [J. A. 382-384].

The record then shows the following: That the investigator for the Committee, Mr. Stripling, at first directed the witness to answer questions "Yes" or "No," followed by an explanation, but that the Chairman overruled his investigator by stating to Mr. Trumbo:

> "The Chair agrees with your point that you need not answer the questions 'Yes' or 'No';

that then the witness, after thanking the Chairman for so ruling, sought to present evidence as to the nature of his work on motion

In the confused setting here of questions reframed and withdrawn, of rulings made and reversed, of directions by the Chairman followed by cross-directions by the Chief Investigator to the witness, it is not surprising that Mr. Trumbo repeated his objections and elaborated upon them. But such repetition and elaboration here became, under the Court's direction, the touchstone of guilt. This was prejudicial error.

It must always be remembered that the only issue of fact left to the jury was that of determining whether there had been, under all the circumstances shown, a deliberate

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picture scripts, which has been condemned by Committee witnesses who preceded Mr. Trumbo (and who he was unable to cross-examine); that the Chairman himself then asked Mr. Trumbo to state how long one of these motion picture scripts was; when advised that these scripts averaged 115-170 pages in length, the Chairman announced:

"They are too long—too many pages";

thereafter, following many interruptions in connection with the question "Are you a member of the Screen Writers' Guild?", Congressman McDowell observed to the witness:

"It is no disgrace, you know, to identify yourself as a member of a labor union in the United States. Most of us belong to something."

To which Mr. Trumbo replied:

"Mr. Chairman, I would not consider it a disgrace to be a member of a labor union."

Shortly thereafter the Chairman (pounding his gavel) declared:

"Excuse the witness—."

But this time the investigator overruled the Chairman with.

Mr. Stripling: "Just a moment, Mr. Chairman—"

Whereupon Mr. Trumbo asked:

"Am I excused?"

Then the Chairman reversed himself and said that Mr. Trumbo was not excused. Thereupon, patently confused by these conflicting orders, Mr. Trumbo asked the Chairman whether the quality of his last answer was acceptable, to which the Chairman replied:

"That hasn't got anything to do with your answer to the last question." [J. A. 382-390].

and intentional refusal to answer. At the very least the question here was not free from doubt. It should have been left to the jury fairly, unfettered by the charge that the witness was committing some offense by repetition and elaboration (see *Bihn v. U. S.*, 328 U. S. 633).

C. Utilization of Government Employees as Jurors in This Particular Case Involving the House Committee on Un-American Activities as the Principal Prosecuting Witness, Denied to Petitioner a Fair Trial Under the Sixth Amendment.

Petitioner adopts the argument on this point in the *Lawson* petition.

D. The Trial Court Erred in Denying Petitioner's Challenge and Motion to Dismiss the Jury Panel in That (1) the Use of Questionnaire Containing the Question Whether the Prospective Juror Holds Any "Views Opposed to the American Form of Government" Was Improper and Invalidated the Jury Panel, Particularly in the Present Case, and (2) the Defendant's Right to an Impartial Jury Drawn From a Cross-Section of the Community Was Abrogated by the Establishment of Qualifications for Jury Service Other Than Those Required by Statute and Which Limited the Representative Character of the Jury.

Here, as in the *Lawson* case, the petitioner filed, and introduced evidence in support of, a challenge and motion to dismiss the jury panel, which was denied [J. A. 71-99]. The question of fact and of law are similar to those set forth in the *Lawson* case. However, evidence was presented in this case to supplement the facts established in the *Lawson* case.

In this case, it was admitted that the Jury Commission itself had reached the conclusion that the question whether

the prospective jurors held any "views opposed to the American form of government" is not "sufficiently clear" and is "too broad." However, the Commission has continued to use the question because it felt it to be "essential" and the Commission had not "been able to arrive at a better question" [J. A. 93-4].

The Jury Commission considered the manner in which questionnaires were filled out and the quality of the handwriting on the questionnaires to determine the "intelligence" and "understanding" of the prospective jurors [J. A. 100, 171-8]. It was conceded that the evidence of intelligence deduced from handwriting is "superficial," but, the Jury Commissioner said, "We work on the best evidence we have" [J. A. 110-11].[6] This admittedly superficial and speculative test to determine "intelligence" is buttressed by a fundamental and clear-cut consideration—

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[6]Illustrative of the nature of the tests made is the following testimony of the jury commissioner?

"Q. I direct your attention now to 233 (number of jury questionnaire), and ask you what the reason for your judgent in disqualification on that was? A. The question in this case was whether the individual was sufficiently intelligent.

Q. What is there that you doubt her intelligence? A. The general appearance of the form.

Q. Can't you be a little more specific than 'The general appearance of the form'? What is there about the general appearance of the form? A. In my judgment there was a question as to whether that was prepared by a person who was entirely literate.

Q. What is there about it that made you question the literacy? Just what can you tell us? A. If you look at the form, the general appearance, the form of printing and so forth gave a question as to whether the person was literate.

Q. You mean you didn't think this person could read or write? A. It wasn't a question of that. It was a question of general literacy, including intelligence and so on.

Q. Did you think this person was able to understand the English language? A. I couldn't tell.

the job classification of the prospective juror. Thus, "one of the many factors which the Jury Commission would consider as tending in the direction of disqualifying him (the prospective juror) as a juror * * * is * * * a past history of being a maid, or a janitor, or a laborer, or some such occupation which does not require a high standard of education" [J. A. 183].

Another matter weighed in determining "intelligence" is the foreign birthplace of some of the prospective jurors [J. A. 123]. The resulting disqualification of persons in lower economic classifications and those of foreign birth is inevitable [J. A. 109-128; 169-177] while at the same time native-born Americans in the higher economic categories pass muster, despite poor handwriting [J. A. 178-80; Defs. Exs. 5 to 58; J. A. 184].

The evidence establishes that the tests and qualifications devised by the Jury Commission are vague and

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Q. You couldn't tell from this whether the person was able to understand the English language? A. There have been many cases like that where we found they didn't.

Q. You mean you couldn't tell that a person who fills out, answers each one of the questions responsively to the question that is asked, 'Place of birth: Washington, D. C.; Date of Birth: November 22, 1899; Are you able to read and write and understand the English language: Yes; What is your occupation: Maid; Give name of business and business address: Lansburgh's Department Store, 7th and E N.W.; How long have you been engaged in your present business: 23 years' that person doesn't understand the English language? A. In my judgment there was a question after looking at it, and I wanted the conclusion with my colleagues.

Q. Will you please point out one specific thing on that questionnaire, one specific thing which raised a question? A. Under the law my duty is to look at these and come to a conclusion as to judgment, and that was my judgment.

Q. Point to one specific thing upon which that judgment was based. A. The general appearance of the filling out of the form. It was crude. It was not the filling out of a person of, I would say, intelligence and education" [J. A. 109-11].

ambiguous; they result in the Jury Commission determining for itself what kind of jurors will bring in correct verdicts; they discriminate against persons in the lower economic groups and those of foreign birth; they are inconsistent with the desired aim of selecting a jury which constitutes a representative cross-section of the community.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

Nos. 248-249

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITIONERS' REPLY BRIEF.

The Government's brief in opposition appears to concede that certiorari ought to be granted, limited, however, to that question now pending in *Dennis v. United States* (No. 14, this term), concerning the qualification of government employees to sit in cases of the instant type. The Government further contends, however, that all other constitutional questions involved, while of great importance, have already been resolved adversely to the petitioners by prior decisions of lower Courts.

While we agree that the jury question is the same here as in the *Dennis* case, it is our earnest contention that none of the constitutional questions involved in these cases having as yet been determined by this Court, but they should be because of their grave and transcendent importance.

It is true that some of the constitutional questions here urged are present also in *Eisler's* case (No. 255, October Term), and that they are still pending before this Court and are as yet undetermined. Of those unresolved issues, and of their profound significance, present and late members of this Court have but recently said:

> "Those issues did not leave when Eisler did. They remain here for decision; they are of the utmost importance to the profession and to the public." (Mr. Justice Murphy, at p. 1330, *Eisler v. United States*, 93 Sup. Ct. Adv. Op., June 27, 1949.)

and,

> "These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon congressional procedures as well. No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here . . . But it is due to Congress and to future witnesses before its committees that we hand down a final decision." (Mr. Justice Jackson, at p. 1330, *idem.*)

But additionally, these petitions present certain further and different constitutional problems which are not involved in *Eisler's* case or in any other of the cases hereto-

fore passed upon or presently pending. Nor does the Government's brief in opposition reach them. Instead of answering the constitutional questions arising out of the facts of these cases and stated in the petitions [see questions I-VI, inclusive, pp. 23-25 Lawson petition] the Government posed limited questions disregarding the entire factual context of these cases and avoiding many of the constitutional issues presented thereby.[1] We shall list these issues briefly.

(a) Among the additional constitutional questions here involved is the question whether the power of this official branch of the government, viz., the House Committee on Un-American Activities, was exercised *in this particular hearing as against these particular petitioners and others similarly situated in conformity to the Constitution and particularly in conformity to the Fourth, Fifth, Ninth and Tenth Amendments thereof* (*as well as the First*). In short, petitioners contend (and the facts here are not in dispute), that in this particular investigation into the Hollywood motion picture industry and as to them as motion picture wirters, the Thomas Committee acted in excess of the lawful bounds of its power and that they could therefore rightfully have refused to answer the interrogatories.

That question, under the weight of the authorities, is a legal, and not a political question and is one properly reviewable by the judiciary.

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[1]Pages 17, 18 and 19 of the Government's brief in opposition here are an almost exact duplication, word for word, of pages 48, 49 and 50 of the brief for the United States in the *Eisler* case (Oct. Term, No. 255). This may account for the inappositeness of much of the argument in opposition of the Government in the cases at bar.

In the landmark case of *Burnham v. Morrissey* (14 Gray) (Mass.), it was declared:

> "The House of Representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by the Court. . . . Especially is it competent and proper for this Court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written constitution no branch or department of the government is supreme; *and it is the province and duty of the judicial department* to determine, in cases regularly brought before them, whether the powers of any branch of government and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." (Emphasis supplied.)

Thus in *Daugherty's* case, 273 U. S. at 175:

> "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But, if contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourne v. Thompson* and *Marshall v. Gordon,* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourne v. Thompson* and *In Re Chapman,* that a witness may refuse to answer WHERE THE BOUNDS OF THE POWER ARE EXCEEDED." (Emphasis supplied.)

And in *Sinclair v. U. S.,* 279 U. S. 263:

> "While the power of inquiry is an essential and appropriate auxiliary to the legislative function, it

must be exerted with due regard for the rights of witnesses and that a witness *rightfully may refuse to answer where the bounds of power are exceeded. . . .*" (Emphasis supplied.)

But the Court below held and the Government now contends that there can be no judicial review of a congressional investigation to determine whether in fact and in actual application to private citizens the particular investigation did exceed the lawful bounds of the power. In short compass, the undisputed facts out of which the asserted violations of the constitutional rights of petitioners arose are these:

In October, 1947, the House Committee on Un-American Activities conducted an investigation of the Hollywood motion picture industry. Throughout the course of that particular hearing it called for the blacklisting and the discharge of certain writers and directors whom it considered Communists or "fellow travelers." These petitioners were among those writers. Before they were called to the stand, their employers preceded them, and this official agency of government—the House Committee—then and there directed these employers to utilize their employers' association as the instrumentality to effectuate that demanded blacklist and that discharge. While all this was going on, the House Committee overruled petitioners' request that they be afforded, in such a setting, certain minimum procedural rights of due process—a chance to cross-examine their accusers, to present statements in their defense. All these requests were denied. At the hearing and as one of the direct and avowed objects thereof, the Committee utilized its power as an agency of government directly to censor the content of films as well as the content

of the particular writings, thoughts, and associations of petitioners. The petitioners, against that background, were then called upon to disclose to the Committee their trade union and political affiliation, under pain of contempt. And finally, the Committee authoritatively asserted that the petitioners were called as witnesses at that particular hearing so that they would "have their day in Court, so to speak, to answer if they could the allegations which had been made against them."

The Government's only answer to these undisputed facts is that they give rise to no constitutional issue, and indeed that they raise no legal question at all. If the Government's view is correct, then a Congressional investigating committee can do no constitutional wrong to the private citizen before it. The Court should resolve this arresting problem.

(b) The petition further presents the question whether in the context of this hearing, this investigating agency of government was reviving the oath *ex officio,* contrary to the First, Fourth and Fifth Amendments by compelling the private citizen witness to disclose whether he was or was not a member of the Communist Party, or whether he was or was not a member of the Screen Writers Guild.

According to the Committee's own statements, it was conducting an investigation to ascertain what persons employed in the motion picture industry in Hollywood were Communists. To this end, the Committee asserted, it required witnesses to affirm or deny under oath whether or not they adhered to the political "heresy" of Communism. Is this or is it not an oath *ex officio* condemned by the First, Fourth and Fifth Amendments? No answer to this can be found in the Government's brief. The pages of

history bear witness to the importance of this issue. To this Court, it presents the question whether the inquisition in modern dress shall be judicially sanctioned.

The argument supporting the proposition that the question was such a proscribed revival of the oath *ex officio* is set out at pages 37-51 of the Lawson petition.

This proposition has never been decided by this Court, although the problem of the governmental utilization, in a particular proceeding, of the forbidden oath has long been the subject of comment by, and the concern of, this Court (*cf. Watts v. Indiana,* 93 L. Ed. Adv. Op. at p. 1438 and again at pp. 1148, *et seq.*).

(c) These petitions, and these alone, present the question whether the Committee's utilization of governmental power to compel answers to these particular interrogatories was contrary to the First, Fourth and Fifth Amendments as both a forbidden and an unreasonable search by officialdom into belief and association, in disregard of the right of the individuals to be let alone with respect to these matters (see pp. 43-51 of Lawson Petition). This issue has not been, but ought to be, resolved by this Court.

(d) Petitioners raise the question of the impact of the Ninth and Tenth Amendments upon the asserted congressional power of investigation of the beliefs and opinions of a private citizen where neither acts nor conduct is involved, but only the expression by the people of political and economic opinion and association. Petitioner has asserted and reasserts that under our system the people, as the ultimate sovereign, cannot be made to account to their servants, the officials of government, as to the nature or the content of their political or economic beliefs or asso-

ciations. For their acts and conduct private citizens may, in proper cases, be held to answer; for the nature, kind or the quality of their thoughts or association, they need answer to no official, high or petty.

We say that the effort by government to compel disclosure of the private citizen's politico-economic "unorthodoxy," whether asserted by a congressional investigating committee or by a school board or by any other arm of the State, directly impairs the ultimate sovereignty of the people guaranteed by the Ninth and Tenth Amendments. The interrogatories here put concerning petitioners' orthodoxy were not asked *in vacuo;* they were not part of some illusory census taking; they were designed (and the whole committee has here declared that they were thus designed) to compel compliance with a norm of belief considered by the Committee to be the only true "Americanism." Whether or not such compulsion comports to our constitutional system presents a question as compelling as any in our time. It is not answered by references to the right to unseat congressmen at ensuing elections.

(e) The Government makes no reply to petitioners' contention that this particular investigation constituted censorship of motion pictures (Lawson Petition 61-68).

That direct governmental censorship of ideas is at odds with the Constitution is hardly open to question. But the drive of some public officials to establish control over the minds and voices of the people through such censorship continues. The direct road being blocked, the same goal is nevertheless sought through devious detours. Taxation and denial of the use of the mails have been tried. But this Court has barred the way. It has affirmed the propo-

sition that it is censorship which the Constitution forbids regardless of the route by which it is reached.

The Government concedes that the Committee's hearings may have influenced the content of motion pictures. It disposes of this striking concession by the assertion that such an "indirect consequence may result from any investigation." Ignored is the fact that the Committee in the hearings demanded of the producers that they make motion pictures which conform with views of the Committee members and that they discharge and blacklist non-conforming writers, producers and directors. If censorship thus resulting be an "indirect consequence," it is not an incidental one. Nor is the censorship any less direct than was that achieved by taxation and by foreclosing the use of the mails. The very concession that censorship is thus achieved by a new method presents to this Court a constitutional question of first magnitude.

(f) Petitioners have predicated one of their major contentions upon the claim of violation of the due process clause of the Fifth Amendment. Except for a casual reference to the facts upon which the contention is based, the Government has chosen to ignore the point. Let it be clear that petitioners are concerned here not with the motives of the Committee—*i. e.*, the reasons for its action—but rather with the Committee's use of its power as an agency of government—*i. e.*, what it actually did officially in this particular hearing.

This is not a situation in which the action of the Committee was within the scope of its authority, with the claim being advanced that its motives for such proper action were impure; this is a case in which the action of the Committee was in excess of its power, regardless of its motives,

and therefore it violated the constitutional rights of petitioners. The Committee *did* establish for itself standards of "un-Americanism" and it *did* decide for itself what punishment should be inflicted for the violation thereof; it *did* apply such standards to past conduct; it *did* adjudicate the "guilt" of the petitioners; and it *did* use its powers to inflict punishment upon them; in the process of so doing it *did* violate the basic concepts of justice established by civilized society, thereby denying to petitioners every aspect of due process.

Unless it be clear that the due process clause of the Fifth Amendment is inapplicable to the utilization of governmental power by Congressional committees, this action of the Committee in excess of its power presents a serious question of due process. Such a question has always been treated as judicial in character, and it cannot be brushed aside by the Government's *ipse-dixit* that this is a mere abuse of power for the people to correct.

The failure of the Government to consider these contentions is particularly important in the light of its position that the derelictions of the Committee may be corrected only by the electorate. Yet it is this very power of the electorate to determine, free from coercion, who shall represent the people and how they shall do so which is is for the people exercising their sovereign powers to being impaired by the Committee. The assertion that it remedy the abuses of their governmental servants, but that these very servants have the right to impede the exercise of this sovereign power is a *non sequitur*. Only an independent people can exercise such sovereignty. The silence of the Government on this vital issue cannot conceal its gravity.

In the balance of this brief we shall answer those specific arguments which the Government did advance and for ease of reference we shall follow, so far as possible, the same paragraph numbering which the Government used for each of its separate contentions in its brief in opposition.

(1) We are told first that petitioners are foreclosed because of the rule laid down in *Barsky v. U. S.* and in *Josephson v. U. S.* Fortunately, however, the Government itself has already adequately distinguished these two cases from ours.

Thus, in *Barsky's* case the Government, in addressing this Court, declared:

> "It may be noted in this respect that on the facts of this case the Court below need not have gone any further in its opinion on this issue than the last full paragraph which appears at 633 of the record. The remaining discussion assumes that questions possibly might be asked of petitioners which would have demanded disclosure that they are believers in Communism or members of the Communist Party. But such questions were not asked, *and the case thus does not present that question.*" (See brief of Government in opposition in *Barsky v. U. S.* at p. 13 thereof.)

But this case does present that very question which the Government has already confessed was not involved in *Barsky's* case. And of course in *Barsky's* case there still pends a petition for rehearing for this Court, which at this writing is undetermined.

The next authority cited as adversely determinative of this petition is the *Josephson* case. But at pages 7 and 8 of the Government's brief in opposition to the *Josephson* petition for certiorari (No. 535, October Term 1947), it

was asserted there that Josephson, unlike these petitioners, had refused to be sworn, had refused to answer any questions whatever, and had chosen to attack the legality of the Committee's enabling resolution before any of his rights were threatened by the Committee, and therefore said the Government, Mr. Josephson had no standing whatever to raise the constitutional issue. And it continued to be the position of the Government that there was a meaningful distinction between the instant case and *Josephson's* case, for one year later we observe that in its brief in opposition filed with this Court in *Eisler's* case (October Term, 255) the Government declared:

> "Here as in the *Josephson* case, it is questionable whether petitioner has standing to challenge the constitutionality of the committee's authority in view of his refusal to submit to any and all interrogations except on conditions which we shall show he had no right to impose. In our brief in opposition to the *Josephson* case (No. 535, October Term 1947), we pointed out (pp. 7-8) that Josephson . . . had chosen to attack the legality of the committee's enabling resolution before any of his rights were infringed or threatened by the committee, and therefore had no standing to raise constitutional issue."

There could be no clearer concession that the denial of the writ in *Josephson's* case does not preclude the determination at this time of any of the issues here involved.

None of the other cases referred to in paragraph 1 (pp. 13-14) of the Government's brief has as yet been determined by this Court; it is therefore unnecessary to

argue their ineffectiveness now to foreclose the grant of the writ here sought.[2]

As ultimate authority for the proposition that this Court has already held that no constitutional right is impinged or burdened by the compulsory disclosure of political belief or affiliations, we are finally cited by the Government to the case of *National Maritime Union v. Herzog,* 78 Fed. Supp. 146, affirmed 334 U. S. 854. But this Court expressly declined to affirm and instead left open, that part of the ruling of the statutory court in the *Herzog* case which upheld the constitutionality of section 9h of the Taft-Hartley Act (the non-Communist oath requirement); the memorandum decision of this Court so holding is set out in 92 L. Ed. 1776, and is as follows:

> "June 21, 1948. Per Curiam: The decision of the statutory three judge court is affirmed to the extent that it passes upon the validity of section 9f and (g) of the National Labor Relations Act, as amended by the Labor Management Act of June 23, 1947, . . . *We do not find it necessary to reach or consider the validity of section 9h.* . . ." (Emphasis supplied.)

The *Herzog* opinion thus leaves this precise problem open and undecided. It seems clear, therefore, that no

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[2]The remaining cases referred to in the Government's brief are clearly neither determinative nor persuasive:

Eisler v. U. S., 338 U. S. 189, cert. granted, removed from docket;

Dennis v. U. S., cert. granted on jury question;

Marshall v. U. S., petition for cert. pending, No. 197;

Morford v. U. S., petition for cert. pending, No. 236.

anterior decision of this Court precludes the grant of certiorari on any of the constitutional issues here involved.[8]

2. The importance of the constitutional questions raised in the petitions for writs of certiorari is accentuated by the Government's discussion of the issues in its opposing brief (pp. 14-20). The views therein expressed on the protection—or rather lack of protection—which the Bill of Rights affords ordinary citizens in their relations to the State have never been stated in any decision of this Court. The Government's position, if accepted, would validate governmental action the admitted effect of which is to prevent the uncoerced expression of opinion. It would uphold the right of Government to act in a manner which burdens certain types of speech—because governmental officials assert that the beliefs expressed are evil. Therefore, it is of the utmost public importance, the petitioners respectfully submit, that this Court finally determine the fundamental issues raised herein.

These cases involve more than the issue of the violation of the First Amendment as posed by the Government in its brief at page 14. The issue of compulsory disclosure of political faith, speech and association and of restraints in these areas involves the Fourth, Fifth, Ninth and Tenth Amendments as well as the First. Because the Government has failed to discuss the impact of these Amendments upon the problems presented, petitioners rest upon the petitions herein with respect to said matters.

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[8]Certiorari was granted during the last term in the *Parker* case (No. 711, Oct. Term, 1948) involving the same problem, placed in the context of state action.

At the outset, we must deal with the Government's contention that the First Amendment's prohibition against the enactment of a law abridging freedom of speech does not apply to the claimed right of Congress to inform the public. In the first place, "informing the public" is quite distinct from "exposure," through compulsory disclosure of belief and opinion, for the purpose of blacklisting and censorship. This distinction creates a constitutional question of basic importance for this Court to determine.

Moreover, this argument begs the question. The asserted power to inform the public[4] is here predicated upon a statute. One issue presented here is whether the statute as construed to grant this right to inform the public casts an unconstitutional burden upon free speech.

The particular statute enacted by Congress, Legislative Reorganization Act of 1946, Chapter 753, Section 121 (b), 60 Stat. 812, 823, 828, creating a Committee on Un-American Activities, authorized it to conduct an inquiry into opinion and belief, and to compel the disclosure of beliefs and opinions by the subpoena process. Whether such a statute can be squared with the fundamental law is a question which only this Court can answer under its constitutional commission. The question is one of transcendent importance. Its answer does not affect the general investigatory power of Congress, nor does it call for judicial interference with the legislative process as the Government brief implies. A law which abridges freedom of speech is no less invalid under the Constitution because the means used is the investigatory process, than

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[4]That no such power exists, except as it results incidentally from an investigation designed to secure information with respect to legislative problems, is argued in the petition and is not dealt with in the Government's brief.

is a law which curtails the dissemination of ideas by the use of the taxing power or the commerce power. The vice of these statutes lies not in the means used, but in the ends attained.

Clearly, this Court has never conceived the determination of the unconstitutionality of federal or state statutes under the Bill of Rights as an interference with the legislative process, or simply as a matter which "lies with Congress and, ultimately, with the voters" (Govt.'s Br. p. 20).

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."
>
> *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 638.

See also the dissenting opinion of Chief Justice Stone in *Minersville School District v. Gobitis,* 310 U. S. 586, 605-607.

The claim of the petitioners here is that the provisions of the statute enacted by Congress creating the Committee on Un-American Activities are unconstitutional, that the measure acts as a pervasive restraint upon their basic freedoms to think and speak freely, and that Congress was without power to so infringe upon their liberties.

Furthermore, whether the restraint claimed is the result of a law or of any other exercise of official authority is immaterial. "Where the First Amendment applies, it is a denial of all governmental power in our Federal system."

(*Marsh v. Alabama,* 326 U. S. 501, 511.) See also *Bridges v. California,* 314 U. S. 252, and *American Federation of Labor v. Swing,* 312 U. S. 321. This principle we apprehend embraces the congressional investigatory process of our Federal system.

It is the claim, that liberty has been infringed by the unlawful exercise of governmental authority, which the petitioners have asked this Court to adjudicate. To such a claim, especially as it arises in a new and significant context of circumstances, this Court has never turned a deaf ear.

In the second place, the Government appears to overlook the importance of the question, not heretofore passed upon by this Court, concerning the operation and effect of the statute herein involved. The petitioners have raised the problem of the unconstitutional construction and application of the measure creating the Committee on Un-American Activities in these particular cases. They contend in their petitions (p. 18) that the Committee construes its powers under the enacting statute as authorizing it "to censor the screen by dictating to the film producers both the contents of films to be made by them and the political qualifications of the personnel to be employed in the production of motion pictures." The Government in its opposing brief implicitly concedes that the question is fairly presented by the petitioners, for the Government avers (p. 19):

> "It is our position, simply stated, that the Committee was empowered—and constitutionally so—to inquire into the extent to which this medium of mass communication (the motion picture) was being used to spread Communist propaganda, . . ."

The Government's position of necessity is that, under the statute creating the Committee, Congress has the right to control the spreading of propaganda by a medium of mass communication. Such control is censorship. There is no decision of this Court, nor can one be envisaged, which sustains a statute authorizing officials of Government to censor, dictate or prescribe the content of ideas disseminated by citizens or organizations of citizens. "If there are any circumstances which permit an exception, they do not now occur to us." (*West Virginia State Board of Education v. Barnette, supra,* 642). See also *Hannegan v. Esquire,* 327 U. S. 146. A determination of this issue is of importance to every segment of the population, to the radio, to the press, to industry, to trade unions, to political, social and economic organizations, to educators, scientists, ministers—indeed, to the multiford individuals and organizations in America engaged continually in the dissemination of ideas. The problem is a recurring one (*e. g.,* the recent request by the Chairman of the Committee to the various colleges throughout the nation for a list of the textbooks used in the schools) and should be resolved by this Court.

A third facet of this constitutional issue which the Government appears to gloss over is the right of the Committee on Un-American Activities to compel the disclosure of one's political affiliation or trade union membership. The question is novel and has never been answered by this Court. The public importance of the question appears clear. Decisions of this Court such as *Stromberg v. California,* 283 U. S. 359; *De Jonge v. Oregon,* 299 U. S. 353; *Herndon v. Lowry,* 301 U. S. 242, and *Schneiderman v. United States,* 320 U. S. 118, would appear at least to have established that the right to peaceably associate with others of a similar political creed is a right fully protected

from governmental abridgement under the First Amendment. A similar conclusion with respect to trade union membership would appear to flow from the decisions of this Court in *Thornhill v. Alabama,* 310 U. S. 88, and *Thomas v. Collins,* 323 U. S. 516. Whether the compulsory disclosure of such political and trade union membership constitutes a restriction upon this fundamental right of association, particularly where the disclosure is required as part of an investigation in the area of speech, association and belief, is, of course, the critical issue here. Decisions of this Court running from *Cummings v. Missouri,* 4 Wall. 277, to *West Virginia State Board of Education v. Barnette, supra,* would appear to sustain, it is respectfully submitted, the petitioners' view that the compelled expression under Governmental compulsion of one's political or economic creed, in the course of an investigation into speech, association and belief, constitutes an unlawful burden upon freedom of the belief, speech and assembly protected by the Bill of Rights. Since the practice of compulsory disclosure of opinion and belief appears to be gaining momentum among officials of Government on federal, state and local levels, the need for a definitive determination of the question by this Court becomes increasingly important.

In the light of the foregoing, the Government's discussion of the constitutional questions in its opposing brief appears only to emphasize the need for a final resolution by this Court of the basic issues involved herein. The argument of the Government in its essence has a two-fold character. On the one hand, it is urged that the statute creating this particular Committee neither on its face nor in operation and effect constitutes a burden upon freedom of belief, speech or assembly. On the other hand, if the

Court does not accept this view, then the Government urges that such burdens are constitutionally appropriate because freedom of belief, speech and assembly are not absolute.

It appears to the petitioners, it is respectfully submitted, that the Government's first argument overlooks the record and disregards the applicable law. The notion that a statute which impinges upon speech or assembly is constitutionally valid so long as it refrains from using language of restraint, punishment or compulsion (Govt.'s Br. p. 16) runs counter to history and to law.

> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." (*Thornhill v. Alabama, supra,* 97.)

See also:

Near v. Minnesota, 283 U. S. 697;
Grosjean v. American Press Co., 297 U. S. 233;
United States v. Lovett, 328 U. S. 303.

Moreover, the Government appears to misconceive the construction and application which this Committee gives to its own authorizing statute. This Committee construes its power under the law as authorizing it to direct the discharge and blacklist of individuals in private industry, as authorizing it to censor the content of motion pictures and to dictate to the motion picture industry the political and trade union qualifications of personnel employed therein (Lawson Petition, p. 30). The record here amply establishes the Committee's own view of its powers. Whether such a construction of the statute is constitutionally valid is a question which should be determined by this Court.

The petitioners submit that it is a matter for public concern when officials of Government state that "while disclosure before the Committee of membership in the Communist Party or the Screen Writers' Guild may have caused petitioners unfavorable publicity and consequent economic damage, and thereby, have discouraged others from subjecting themselves, by affiliation with the Party or the union or by the expression of heterodex beliefs, to the risk of a similarly unfavorable reaction from the public and their employers, and while the content of motion pictures may have been influenced by the producers' fears lest the use of the screen to express any ideas other than those deemed proper by the Committee might result in unfavorable publicity, it does not follow that the First Amendment was violated." (Govt.'s Br. pp. 16-17.) It is a grave assertion for the Government to make that a statute construed to cast the burdens of loss of employment and censorship upon the exercise of freedom of speech and assembly is nevertheless free from constitutional taint. This Court has held to the contrary. *(United States v. Lovett, supra).* Thus, the Government's very assertion poses a constitutional question of great consequence.

At page 17 of its brief, the Government presents the view that the First Amendment "was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made to or by an investigation." If by this assertion the Government means that in an investigation into acts and conduct no protection is afforded against unfavorable publicity, then the Government is not discussing the issues presented in this case. On the other hand, if the Government means that this Committee may investigate into the area of opinion and thereby expose to public disfavor the

views or affiliations of the unorthodox, then the issue is drawn. Where compulsory disclosure by Government in a proceeding concerned with belief and its advocacy actually does burden speech, that compulsory disclosure, like any other Government action, runs afoul the First Amendment.

Moreover, the petitioners contend that it was not mere "unfavorable publicity" which engendered the economic sanctions or the censorship to which the Government refers, but rather the action of the Committee itself in the exercise of its alleged powers. We deal here with individuals singled out by the Committee for punishment through loss of employment and blacklisting, and with censorship of the content of their medium of communication. We deal here not with "*any* public investigation" (Govt.'s Br. p. 17), but with an investigation by a particular Committee whose particular authorizing statute is under constitutional attack.

The attempt on the part of the Government to create the illusion that the authorizing statute, neither on its face nor on its application, imposes any sanctions or restraints is fruitless. The statute itself vests power in the Committee to compel the presence of persons and the production of their books and papers through the subpoena process, with the ultimate power to invoke the aid of the courts in inflicting punishment by imprisonment and fines upon reluctant witnesses. (R. S., Sec. 102.)

Contrary to the Government's assertion (at p. 17 of its brief) petitioners do not contend for a "freedom to be silent generally." Petitioners do urge that, *within the domain of the mind*—that is, of opinion, speech and association—the Government may not constitutionally compel disclosure from the private citizen. In effect, the Gov-

ernment states that unless there is an unlimited right of investigation into every area, including that of the First Amendment, there is no right of investigation at all. Petitioners reply that there is a right of investigation but that it is not unlimited, as the Government asserts.

The other argument advanced by the Government is that since "First Amendment rights are not absolute" (Govt.'s Br. p. 18), it was lawful to impose the burdens admittedly placed upon the petitioners' speech and assembly. This contention seems equally untenable. A statute must be so narrowly drawn as to deal only with acts and conduct; otherwise it collides with the First Amendment which precludes any governmental action which infringes upon the content of belief and speech. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut*, 310 U. S. 296, 303.) The Government makes no contention that the statute creating this Committee is narrowly drawn, nor that it has been construed and applied only to acts and conduct. Quite the contrary. The statute is limitless in scope, and it has been construed by the Committee here as authorizing the compulsory disclosure of all beliefs and opinions and of associations with respect thereto.

The Government urges that "the need for accurate firsthand information as a basis for governmental action has been deemed to outweigh the personal inconvenience resulting from compelled disclosures" (Govt.'s Br. p. 18). The petitioners submit that this "balancing of social interest" argument has no applicability in this case. We are concerned here solely with a statute dealing with belief and opinion, and the power of Government acting there-

under to compel disclosure in that area. If that area be completely free from governmental intrusion, it is not sufficient to assert that Government may nevertheless intrude when officials of Government deem it in the public interest to intrude. The concept of the First Amendment that "Congress shall pass no law . . ." woud be converted to the proposition that "Congress shall pass no law except when it appears essential to the public interest." We know of no freedom which would be secure if such constitutional principle were established. This Court has, however, made it abundantly clear that such rule does not prevail. It has stated that no citizen can be forced "to confess by word or act" his faith in politics or other matters of opinion, (*West Virginia State Board of Education v. Barnette, supra,* 642) —no matter how significant the public interest may be, *e. g.,* national unity in the flag salute case. It is in the area outside of opinion and belief that the need for "accurate first-hand information as a basis for governmental action" may outweigh "the personal inconvenience resulting from compelled disclosures." (*Sinclair v. United States,* 279 U. S. 263; *Daugherty v. United States,* 273 U. S. 175.) The distinction was noted early in the history of the country. (*In re Pacific Railway Commission,* 32 Fed. 241, 250 (C. C. N. D. Calif, 1887, Opinion by Field, J.).)

The Government grasps at the notion that compulsory disclosure of the petitioners' political and trade union affiliations was justified as a "preliminary examination to establish witnesses' interest and bias so that their testimony can be evaluated" (Govt.'s Br. p. 16). The record here clearly establishes that in the case of each of the ten witnesses involved, the sole and ostensible purpose of the Committee was to compel the disclosure of their political

and trade union affiliations. In not a single case did the Committee pursue any further line of inquiry. When it failed to compel the answer it sought, each witness was ordered from the stand. This case, therefore, presents the question whether the petitioners could be lawfully compelled to disclose their political and economic creeds, with nothing more.

The Government's recurring allusion to the investigation by the Committee on Un-American Activities into the "operation," "conduct" and "activities" of witnesses as a justification for obtaining a census of the number of members in a political party and trade union distorts the facts revealed in the record. These witnesses were not asked at any time any questions concerning their "conduct," "activities" or "operations."

The power which it is asserted the Committee has to determine the number of adherents to a political or economic creed would authorize the Committee to take a compulsory political and economic opinion census of every person in the United States. This is what the inquisition sought.

On the constitutional issues here, the petitioners urge upon this Court the great public importance of the questions involved. In their essence, the issues involved present another problem in the age-long conflict between the inquisitorial and accusatorial systems of law. Compare, *Watts v. Indiana, supra.* Compulsory disclosure by Government of one's opinions and beliefs and his speech or association with respect thereto have heretofore been unknown to the American tradition, except as an aberration to be quickly extinguished. This Court, it is respectfully submitted, should finally determine for the benefit of

the people, as well as officials of Government, the constitutional validity of the Committee on Un-American Activities, and the lawfulness of the construction and application which the Committee gives to the statute authorizing its creation.

3. Petitioners were summoned to appear before the Committee. They were charged with contempt for refusal to answer questions put to them by the Committee. Proof of the existence of a lawfully constituted committee is therefore essential to uphold the conviction. If the questions were not put to petitioners by the Committee, then these cases should be dismissed.

It is conceded that a quorum of the full Committee was not present when petitioners were questioned. The Government's case depends upon the authority possessed by the Chairman when he was claimed to have appointed[5] the subcommittees which put the questions to petitioners.

The Government makes no contention that, prior to the appearance of petitioners, the full Committee had ever given authority to the Chairman to make such appointments. Rather, in its reply brief (p. 20), the Goverment argues that the Chairman had an "initial" authority to appoint a subcommittee, subject to "an ultimate veto power" in the full Committee. The proposition is then advanced that the report to the House by the full Committee (on November 17, 1947, twenty days after petitioners' appearance before the purported subcommittee) may be con-

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[5]At page 8, footnote 3, of its brief, the Government, after correctly stating the record pertaining to the *Lawson* case, goes on to say that the Chairman's announcement before Trumbo testified was "almost identical." This is not so, and the distinction is argued in Trumbo Pet. p. 26.

strued as a "tacit recognition" by the Committee that its Chairman had authority to designate subcommittees.

If this presumed tacit recognition of the Chairman's claimed authority had taken place *before* petitioners testified, the case would have fallen within the precedent set in *Meyers v. United States,* ..... App. D. C. ....., 171 F. 2d 800, and discussed at T. R. 371-3.

It is a vastly different situation when the necessary authority is conferred by tacit recognition *after* the alleged criminal refusal has taken place. This is an attempt to breathe life into a tribunal that was still in a legally embryonic stage when the disputed questions were put to the petitioners.

As we said in Trumbo Petition at page 27, such procedural short-cuts are available to Congress on intra-parliamentary matters but they cannot be used to make criminal, acts of private citizens which were innocent when committed (Art. I, Sec. 9, Clause 3, Constitution). Such rules of legislative convenience cannot be permitted to affect the rights and liberties of non-members of legislative bodies (*United States v. Smith,* 286 U. S. 6, 33).

There is a remarkable quality about the Government's position that "initial authority" is sufficient to constitute effective action even though it is subject to an "ultimate veto power." This is tantamount to saying that:

A. A bill passed by both houses immediately becomes law and continues in effect until the President vetoes it, or

B. A treaty once signed is effective until the Senate refuses to ratify it, or

C. A nominee for appointment while the Senate is in session takes title to the office until the Senate refuses to confirm the appointment.

The absence of a lawfully constituted quorum should have entitled petitioners to a directed verdict. Here, instead, the Court took the question entirely away from the jury, an error which we submit is fatal to the Government's case.

Clearly, the Chairman was the agent of the House and also the agent of the Committee. The existence and extent of the authority claimed to have been conferred on an agent is a question of fact to be determined by the jury (3 C. J. S. 328). Even if the facts concerning the existence of the Chairman's authority were not in dispute, this was a criminal case in which a directed verdict could not have been ordered against petitioners (*United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 408.)

The Government argues that the question of the Chairman's authority is a question for the judge alone, not the jury. But if the Chairman's authority rests, as the Government claims, on "custom and practice," it would seem that there must be some evidence, before whoever is to decide the fact, that such a custom or practice exists. Having failed to adduce any such evidence in Lawson, we submit that the Government there failed to prove the existence of a validly constituted sub-committee.

In the *Trumbo* case the House Parliamentarian's testimony as to the Chairman's authority, was over petitioner's objection (T. R. 357-9), taken out of the presence of the jury. His testimony was offered to prove, as already stated, that the Chairman's authority to appoint a sub-committee was established by House practice. In such case, the Court might perhaps have charged the jury, as matter of law, that the sub-committee was val-

idly constituted if the jury should find, as matter of fact, the existence of a House practice of appointment of sub-committees by Committee Chairmen. We submit, however, that the existence or non-existence of the practice was for the jury, not as the Government argues, for the Court alone.

Moreover, the Government's brief makes no attempt to answer petitioners' contention that it was error to quash their subpoenas *duces tecum* for the House Committee's records (L. R. 344-6; T. R. 515), the evidence being desired to demonstrate that the Chairman had no authority to appoint the sub-committees here involved. Under the Government's contention that the Chairman's power is subject to review by the Committee (Govt. Brief p. 21), it certainly would have been competent to show, if it was the fact, that the Committee had taken positive action to deprive the Chairman of the power. The Committee's records could have also been offered to negative the existence of any general House custom or practice authorizing the appointment of sub-committees by committee chairmen. In quashing the subpoenas on grounds of the immateriality of the evidence sought, the Court denied petitioners the right to prove from the Committee's records that no House practice authorized the Chairman of this Committee to appoint a sub-committee, or if there was such a practice, the Committee, as it had power to do, had deprived its Chairman of that authority.

Therefore, both because there was no showing of the existence of a lawfully-constituted subcommittee at the time petitioners testified and because the trial court took the question from the jury and decided it adversely to petitioners, these cases should be reversed.

4. To the claim that the instructions of the trial court in the *Lawson* case were prejudicially erroneous with respect to the central issue of fact—*i. e.*, did the proof show that the witness had deliberately and intentionally *refused* to answer—the Government makes the ever convenient rejoinder that when the charge is viewed in its entirety it ". . . loses the prejudicial color which, in the abstract, it might have had."

When dealing not with an abstract definition, as at L. R. 357, but with the facts in this particular case, the trial court said:

> ". . . If you believe . . . beyond a reasonable doubt . . . that he refused to answer questions it is your duty to return a verdict of guilty. Now when I use the words, 'refuse to answer,' I mean this. When you ask a question you are asking something to be answered; and an answer means a responsive reply. An answer, as far as this case is concerned, does not mean any kind of reply that a person desires to give, but it means responsive to the question put, so that, as I say, if you believe beyond a reasonable doubt that the question was asked and the defendant did not give a responsive reply it is your duty to return a verdict of guilty." (L. R. 358.)

The Court then goes on to say:

> "There were four questions that were asked, and I do not mean to comment on the evidence but the court will refer to it because it is the crux of this case." (L. R. 358.)

The Court then states the four questions, and immediately after repeating to the jury the answers of Mr. Lawson, the Court gave this final charge on the subject:

> "Now in testing whether or not you believe from the evidence that the defendant answered the question

propounded by the Committee, you must decide for yourself whether or not the answers given by the defendant to the question satisfy you now as to whether or not he ever was or is a member of the Communist Party. If you can come to a conclusion by the replies the defendant gave to those questions, if you can answer by those replies as to whether or not he ever was or is now a member of the Communist Party, then, of course, it is your duty to return a verdict of not guilty. If you cannot, you must return a verdict of guilty."

In the framework of such specific instructions, reaching, as the court said, the "crux" of the case, and dealing with the specific questions and answers, the crucial (and improper) charge—if the defendant "did not give a responsive reply, it is your duty to return a verdict of guilt"—is not cured, explained or softened by an antecedent general instruction concerning the meaning of abstract words like "wilful" or "inadvertent." Just as the general always yields to the particular when the meaning or purport of language is involved, so the specific and particular charges here determine the meaning conveyed by the sweep of the charge in its entirety.

The trial court here clearly conveyed to the jury that it should convict petitioner if it could not itself tell whether petitioner was or was not a Communist. This was the specific impression meant to be conveyed by the court's particular language and by its charge that if the defendant "did not give a responsive reply, it is your duty to return a verdict of guilty." It stretches too far the import of the clear meaning of words to laymen, to suggest that the improper effect of this language could be watered down by the portion of the charge cited by the Government.

By no test of contempt has it ever before been determined, as did the trial court here so clearly, that a witness is guilty of criminal contempt if he does not give a responsive reply to a question. As we have already indicated responsiveness or non-responsiveness may be some evidence of a refusal, but it is not conclusive proof of refusal as here charged. The misdirection is in the very "crux" of the case, as the trial court itself declared. It was therefore not a "technical error which did not affect the substantial rights of the defendant" (*Ballenbach v. United States,* 326 U. S. at pages 613-615).

Nor is the claimed error here met by the assertion of the Government that "a reading of petitioner's testimony makes it difficult to perceive how the Jury could have reached any other finding," because it is the rule that in view of the place of importance that trial by jury has "in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome the process may be" (*Ballenbach v. United States,* p. 616, *supra*).

And finally there is no conceivable way to reconcile the patently inconsistent rulings of the trial court to the effect first that it did not matter whether Mr. Lawson was or was not a member of the Communist Party [L. R. 356] and second that the jury must find the defendant guilty if it could not itself tell whether Mr. Lawson was or was not a member of that Party [L. R. 359]. The Government, wisely, has not attempted to reconcile these conflicting instructions. But they remain to vitiate the verdict (See *Kraus v. United States,* 327 U. S. 614, at 626, 627).

5. The record in the *Trumbo* case showed that while a witness before the Thomas Committee, Mr. Trumbo repeated his objections to particular re-phrased questions, and elaborated upon them. The trial court charged the jury that petitioner had no right so to do. The Government asserts this was a proper statement of the applicable legal principle, without citing any supportng authority whatever. We submit that neither statute nor case law condemns the mere repetition or elaboration of an objection; nor does it make such repetition or elaboration the compulsory hallmark of guilt. We assert that whether a witness is guilty of deliberate and intentional refusal to answer depends upon a jury's unfettered consideration of all the circumstances shown to exist at the time the witness testified, and not alone upon the elaboration or repetition of objections. This is particularly true here because the record conclusively shows that the investigators repeatedly reframed questions put to Mr. Trumbo, then withdrew them, then made rulings on questions and later reversed them, and that the Chairman gave certain directions to the witness which were followed by cross-directions from the Chief Investigator (See footnote 5, pp. 30-31 of the *Trumbo* petition).

6. It will hardly be denied that the Government carried the burden of establishing that the Committee was conducting an investigation under the authority granted to it. If that be so, it follows that the petitioner might by cross-examination establish the opposite—*i. e.,* that the Committee was not engaging in such an investigation but was engaged in an entirely different project. The Government seeks to justify the denial of such cross-examination upon the erroneous assumption that the cross-examination

was directed to the motives of the Committee. If, as the petitioners sought to establish, the Committee actually used its powers to establish a blacklist and censorship in the motion picture industry, it *acted* in excess of its powers and it may not get judicial support for such *action.*

Anything which casts light upon what the petitioners were trying to say while on the witness stand, particularly in view of the repeated interruptions by the Committee, was relevant to the issue of whether there were deliberate refusals to answer. The written statement and other documents which were rejected did cast such light and their rejection therefore was prejudicial error.

By the Government's own standards, the complete cross-examination of Chairman Thomas on the issue of pertinency should have been allowed. The existence of a "reasonable basis" for the investigation might appear clear when part of the testimony of a witness or witnesses is considered and yet be as clearly absent if the entire testimony of the same witness or witnesses were considered.

7. Petitioner Lawson's motion to quash the subpoena, his prepared statement and his application to recall for cross-examination witnesses who had previously testified were suppressed by the Committee in the report of the proceedings made by it to the House, Gov't. Exhibit 5 [L. R. 382-392].

The Government justifies this by arguing that 2 U. S. C. 194 does not require that "every paper delivered to a

committee by or on behalf of a contumacious witness must be incorporated in the report." But it is the House which must decide whether the witness was "contumacious," not the Committee. In order to arrive at this decision the House should have, at the very least a fair presentation of all that took place, even though briefly summarized.

If the Committee chooses to eliminate in a wholesale fashion, as was done in the present case, it must run the risk that at the point in the proceedings at which the witness is given an opportunity to be heard concerning the nature of the report, an impartial Court may determine that the matter eliminated was essential, and that its elimination deprived the report of a jurisdictional requisite.

The Government does not argue that the suppressed documents were unimportant or that, if revealed, they would not have altered the vote in the House. Instead the position is advanced that the House had "adequate information on which to base a decision" because Exhibit 5 "referred" to the suppressed matters. These "references" are only that:

A. Lawson said, during the pounding of the Chairman's gavel, that if cross-examination were permitted he could demonstrate the perjury of previous witnesses [L. R. 391] and

B. The Chairman's refusal to permit Lawson's statement to be read because he had "read the first line" [L. R. 386].

The House was thus left to conjecture as to what this first line was, as well as the rest of the prepared statement.[6] The Court is referred to Defendant's rejected Exhibits 4, 5, 6, and 7 [L. R. 394-411] for the text of the other suppressed documents.

Despite the Government's reliance upon the fleeting references to the suppressed documents, it is apparent that the House was never apprised of the facts that:

A. Long before petitioners took the stand, their counsel had requested that other witnesses be recalled for the purposes of cross-examination, and

B. The motion to quash the subpoenas was considered at length by the Committee, a recess even being taken for this purpose.[7]

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[6]In offering prepared statements petitioners were merely affording the Chairman an opportunity to comply with Section 133e of the Legislative Reorganization Act of 1946, 60 Stat. 812, which provides that: "Each such standing committee shall, so far as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, * * *"

[7]"Mr. Stripling: Mr. Chairman, the point which Mr. Kenny has set forth—if he has a remedy it is in the courts of the land and not before a committee of Congress. A committee of Congress can no more set aside a law than it can do any other thing. Therefore, Mr. Kenny should go into court, if he seeks any remedy on the points which he has submitted to the committee. I see no point for the committee to interrupt its proceedings to permit Mr. Kenny to stand up and make a lot of points which he knows are out of order before this tribunal.

"Mr. Kenny: Just one brief response to that, and that is: The committee is the servant of the Constitution, just as much as the citizen is, and certainly Congress should be given the opportunity, or any committee of Congress, to consider whether or not it is proceeding constitutionally.

"It is quite true, as Mr. Stripling says, that the courts are open, but I believe that the first opportunity should be given the person who first is accused of proceeding illegally.

"Now, the Committee has this opportunity at this time to consider the basic constitutional principles under which it is proceed-

The Government apparently concedes that a jurisdictional requirement of Section 194 is that the House be adequately informed before it votes a contempt citation. Petitioners submit that evidence essential to a full consideration of the contempt citation was kept from the knowledge of the House in contravention of the statute.

8. The Government apparently concedes that the writ should be granted with respect to the question of the in-

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ing, and I think it would be the first time that this committee ever has done that. I think, if we are given that opportunity, the commitee might well rule with us, if they can hear our arguments out and give them full consideration.

"The Chairman: All right, Mr. Kenny, we have read your brief very carefully. In view of the additional points, however, which you bring up, why, the committee will now take under consideration the whole question, not only based on your original brief, but also these additional points.

"The committee will go into executive session until we have concluded.

"Mr. Crum: Mr. Chairman, may I ask that you consider our motion to cross-examine—

"The Chariman: The meeting will be in recess. The committee will leave the room and go into executive session.

"Mr. Crum: May we hand these to you, Mr. Chairman?

"The Chairman: Yes; glad to have them.

"Mr. Crum: Thank you.

"(The committee went into executive session.)

"The Chairman: The meeting will come to order.

"Mr. Kenny, this is the unanimous decision of this subcommittee. It is the decision on the brief which you submitted, plus the two additional points.

"Mr. Kenny: Yes.

"The Chairman: No committee of Congress has the right to establish its own legality or constitutionality. A committee of Congress cannot disqualify itself from the provisions of the law. We operate under Public Law 601. We cannot set aside this law to suit the convenience of certain witnesses or their counsel. As a former attorney general of the State of California you certainly know that your remedy, if any, is in the courts." (Hearings before Committee on Un-American Activities, 80th Cong., 1st Sess., pp. 288, 289.)

clusion of Government employees in the panel and on the jury.

9. The effect of the question, "Have you any views opposed to the American form of government?" is given no consideration by the Government. The language of the Eighth Circuit Court of Appeals dealing with a similar problem, in *Gideon v. United States,* 52 F. 2d 427, delineates what the Government refuses to face:

> "The effect of the questionnaire upon the jurors must have been baneful; they must have been led to believe that the government had some purpose in asking questions about their beliefs, and was keeping a record of the answers for future use; they doubtless were led to believe also that, in the minds of the government officials, at least, their usefulness as jurors was in some way affected by the beliefs about which inquiry was made; and it is not impossible that they were led to think that the government intended to influence them in their beliefs. * * *
>
> "The qualifications of a juror should be ascertained by questioning in open court in the presence of the parties interested and while the juror is under oath. Secret preliminary questioning is unauthorized, and, in our opinion, should not be encouraged. It is open to the danger of many and serious abuses, and trenches upon the broad ground of fair trial." (p. 429.)

Had the jury commission openly adopted and carried out a policy embracing different standards of eligibility for those in the lower economic categories than for those in the higher categories, the discrimination would have been clear. This clarity would have existed if the Jury Commission had said that it was not concerned about the handwriting of those in higher brackets but would disqualify some of the persons in the lower brackets because of defects in handwriting. Here the process was reversed. The handwriting of all jurors was examined, but of those with "poor" handwriting, only those in the lower economic brackets were disqualified. The reversal of the process tended to conceal its meaning but actually did not change its character or effect. The result was a "systematic and intentional exclusion" of persons in the lower economic categories, condemned by this Court as "abhorrent to the democratic ideals of trial by jury." (*Thiel v. Southern Pacific*, 328 U. S. 217, 220.) The fact that not all persons in the lower economic categories were excluded but that they were merely discriminated against is no more justifiable than is discrimination against Negroes, as distinguished from their *total* exclusion. (*Smith v. Texas*, 311 U. S. 128.)

The petitions for certiorari in each of the cases should be granted in their entirety.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 248

JOHN HOWARD LAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 249

DALTON TRUMBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The single opinion of the Court of Appeals affirming the convictions of both petitioners (L. R. 567-572; T. R. 651-656 [1]) is not yet reported.

[1] The petitions and records in the two cases are designated by the letters L. and T., respectively.

JURISDICTION

The judgments of the Court of Appeals were entered June 13, 1949 (L. R. 573; T. R. 657). The petitions for writs of certiorari were filed August 11, 1949, within the time as extended by orders of Mr. Justice Jackson (L. R. 579; T. R. 663). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a) F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the House Committee on Un-American Activities was constitutionally authorized to investigate Communist infiltration of the motion picture industry.

2. Whether, consistently with the First Amendment, witnesses could be required by the Committee to state whether they were members of the Communist Party and the Screen Writers' Guild.

3. Whether the members of the Committee before whom petitioners appeared constituted a competent subcommittee and, if so, whether the determination of that question was properly left to the jury.

4. Whether the jury was properly instructed in respect of the proof that petitioner Lawson refused to answer the Committee's question.

5. Whether the jury was properly instructed in respect of petitioner Trumbo's right to state objections to questions put to him by the Committee.

6. Whether petitioner Lawson's cross-examination of the chief government witness was unduly restricted.

7. Whether the court erred in excluding evidence that in reporting petitioner Lawson's contumacy to the House, the Committee omitted matters concerning petitioner's refusal to testify.

8. Whether government employees should have been excluded from the juries which tried petitioners because of the nature of the charges against them.

9. Whether the method of selecting the jury panel gave it an unrepresentative character.

STATUTES AND RESOLUTION INVOLVED

R. S. § 102, as amended (2 U.S.C. 192), provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

R.S. § 104, as amended (2 U.S.C. 194), provides:

> Whenever a witness summoned as mentioned in section 102 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Rule XI (q) of the Rules of the House of Representatives, as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 823, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st Sess., 93 Cong. Rec. 38) provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized

to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

Petitioners were indicted separately in the United States District Court for the District of Columbia for violations of R. S. § 102, *supra*. The indictments charged that upon their appearances, pursuant to summonses, to testify before the House Committee on Un-American Activities, they refused to answer the question whether they were or ever had been members of the Communist Party. Petitioner Trumbo was charged, in addition, with having refused to state whether he was a member of the Screen Writers' Guild (L. R. 9-10; T. R. 9-10).

The evidence adduced by the Government at petitioners' separate trials was substantially similar, so far as the issues presented here are concerned, and for that reason the following summary deals principally with Lawson's case.

On September 19, 1947, petitioners were served with subpoenas directing them to appear and testify before the Committee on October 23, 1947. The date for their appearance was subsequently postponed to October 27, 1947. (L. R. 381-382; T. R. 580-582.) a member of the Screen Writers' Guild. (L. R. 9-10; T. R. 9-10.)

On October 20, 1949, in the course of its investigation of alleged Communist infiltration into the motion picture industry (L. R. 188), the Committee heard Samuel Grosvenor Wood, a leading producer and director, testify that in his opinion petitioner Lawson was a Communist and was "active in every piece of Communist work going on"

(L. R. 220, 224). The following day John Charles Moffitt, a motion picture critic, told the Committee that a former secretary of the Communist Party for Los Angeles County had testified before the Tenney Committee of the California Legislature that Lawson was sent to Los Angeles by the Communist Party to organize its activities in Hollywood. Moffitt also stated that while he was a member of the Screen Writers' Guild, of which Lawson was the first president, he had discovered that it was a "Communist-front" organization. Moffitt testified that he had heard Lawson state that a writer should not attempt to create an entirely Communist script, because it would be identified and destroyed in the front office; that every writer should try to get five minutes of Communist doctrine in every script, particularly in expensive scenes in which important stars spoke the words, so that if it should be discovered by the front office, the studio would be deterred from deleting the matter by the expense involved in remaking the scene. (L. R. 227-228.)

On October 22, 1947, Howard Rushmore, who was a prominent member of the Communist Party from 1936 to 1939, testified before the Committee that he had met Lawson in 1937 or 1938 at a meeting of the cultural commission of the Communist Party at the Party's headquarters in New York City. This commission, which was a quasi-subcommittee of the Central Committee of the Party (the governing body), had been set up by Alex-

ander Trachtenberg, a member of the Political Bureau of the Party, upon his return from Moscow about 1934. Trachtenberg told Rushmore that the regular reports of the commission's activities were delivered to Moscow by himself or a courier at least once a year. According to Rushmore, Lawson was in charge of the Party's activities in Hollywood during the time Rushmore was in the Party. (L. R. 224-226.)[2]

On October 27, 1947, when Lawson appeared, and the following day, when Trumbo appeared, Chairman Thomas and two members of the Committee were present. The Chairman announced: "The record will show that a subcommittee is present, consisting of Mr. Vail, Mr. McDowell, and Mr. Thomas" (L. R. 183).[3] After Lawson was sworn, there occurred the colloquy set forth at pages 188-197 of the record, the following portion of which is particularly germane (L. R. 195-197):

> Mr. Stripling:[4] Mr. Lawson, are you now, or have you ever been a member of the Communist Party of the United States?
>
> Mr. Lawson: In framing my answer to that question I must emphasize the points that I have raised before. The question of communism is in no way related to this inquiry, which is an attempt to get control of the screen and

[2] The Committee was informed also that Trumbo was a Communist (see T. R. 245-251).

[3] An announcement in almost identical form was made at the opening of Trumbo's testimony (T. R. 381).

[4] Mr. Stripling was the Committee's chief investigator (L. R. 187).

to invade the basic rights of American citizens in all fields.

Mr. McDowell: Now, I must object——

Mr. Stripling: Mr. Chairman——

(The chairman pounding gavel.)

Mr. Lawson: The question here relates not only to the question of my membership in any political organization, but this committee is attempting to establish the right——

(The chairman pounding gavel.)

Mr. Lawson (continuing): Which has been historically denied to any committee of this sort, to invade the rights and privileges and immunity of American citizens, whether they be Protestant, Methodist, Jewish, or Catholic, whether they be Republicans or Democrats or anything else.

The Chairman (pounding gavel): Mr. Lawson, just quiet down again.

Mr. Lawson, the most pertinent question that we can ask is whether or not you have ever been a member of the Communist Party. Now, do you care to answer that question?

Mr. Lawson: You are using the old technique, which was used in Hitler Germany in order to create a scare here——

The Chairman (pounding gavel): Oh——

Mr. Lawson: In order to create an entirely false atmosphere in which this hearing is conducted——

(The chairman pounding gavel.)

Mr. Lawson: In order that you can then smear the motion-picture industry, and you can proceed to the press, to any form of communication in this country.

The Chairman: You have learned——

Mr. Lawson: The Bill of Rights was established precisely to prevent the operation of any committee which could invade the basic rights of Americans.

Now, if you want to know——

Mr. Stripling: Mr. Chairman, the witness is not answering the question.

Mr. Lawson: If you want to know——

(The chairman pounding gavel.)

Mr. Lawson: About the perjury that has been committed here and the perjury that is being planned.

The Chairman: Mr. Lawson——

Mr. Lawson: You permit me and my attorneys to bring in here the witnesses that testified last week and you permit us to cross-examine these witnesses, and we will show up the whole tissue of lie——

The Chairman (pounding gavel): We are going to get the answer to that question if we have to stay here for a week.

Are you a member of the Communist Party, or have you ever been a member of the Communist Party?

Mr. Lawson: It is unfortunate and tragic that I have to teach this committee the basic principles of American——

The Chairman (pounding gavel): That is not the question. That is not the question.

The question is: Have you ever been a member of the Communist Party?

Mr. Lawson: I am framing my answer in the only way in which any American citizen can frame his answer to a question which absolutely invades his rights.

The Chairman: Then you refuse to answer that question; is that correct?

Mr. Lawson: I have told you that I will offer my beliefs, affiliations, and everything else to the American public, and they will know where I stand.

The Chairman (pounding gavel): Excuse the witness——

Mr. Lawson: As they do from what I have written.

The Chairman (pounding gavel): Stand away from the stand——

Mr. Lawson: I have written Americanism for many years, and I shall continue to fight for the Bill of Rights, which you are trying to destroy.

The Chairman: Officers, take this man away from the stand——[5]

On November 24, 1947, the Committee submitted to the House of Representatives reports that petitioners were in contempt of the House (L. R. 383-392; T. R. 582-592). They included copies of the

[5] Petitioner Trumbo's testimony before the Committee appears at pages 381-390 of the record in his case. In addition to the question as to membership in the Communist Party, which he also refused to answer, he was asked and refused to answer the question, "Are you a member of the Screen Writers Guild?" (T. R. 386).

subpoenas served upon petitioners and the transcripts of their testimony. Pursuant to House resolutions, the Speaker certified the reports to the United States Attorney (L. R. 393-394; T. R. 593) and the indictments followed on December 5, 1947.

Petitioners moved to dismiss the indictments on the grounds that the resolution prescribing the authority of the Committee was unconstitutional and that the questions concerning alleged trade union and political affiliations were not pertinent to the questions under inquiry (L. R. and T. R. 11-13). They also moved for a change of venue on the ground that an impartial trial was impossible in the District of Columbia, due primarily to alleged intimidation to which government employees are subject by Executive Order 9835, the "loyalty order," and because of the nature of the charges against petitioners and their alleged association with organizations on the Attorney General's "subversive list" (L. R. 13-25; T. R. 17-28). These motions were denied, as were motions to dismiss the jury panels because they contained many government employees and, in addition, were selected in a manner not calculated to obtain a representative cross-section of the community (L. R. 6, 29-30, 98; T. R. 6-7, 71, 199). Petitioners challenged for cause the government employees on the jury, as well as those who had any immediate relatives in government service (L. R. 166; T. R. 218). These challenges were overruled. The jury in the Lawson

case included three government employees, one who received a pension from the government, and one whose mother was on a government pension.[6] Eight government employees were on the jury in the Trumbo case (T. R. 216-217, 227, 230).

In each case, after hearing testimony outside the presence of the jury, the trial court ruled that the questions which the petitioner refused to answer were pertinent to the Committee's inquiry (L. R. 242; T. R. 351) and so charged the jury (L. R. 355; T. R. 544).

Petitioners were found guilty as charged (L. R. 43; T. R. 28-29) and on May 21, 1948, each was sentenced to imprisonment for one year and to pay a fine of $1,000 (L. R. 44; T. R. 29).[7] Upon appeal to the Court of Appeals, the judgments of conviction were affirmed (L. R. 573; T. R. 657).

ARGUMENT

1. Petitioners' attacks on the constitutional validity of the Committee on Un-American Activities and, specifically, on its authority to investigate Communist infiltration of the motion picture industry (L. Pet. 61-68, 77-87; T. Pet. 24, 25) raise issues

---

[6] Petitioner Lawson states (Pet. 105) that five government employees were on the jury, but the record indicates that the correct number is three (L. R. 139-140, 152-168).

[7] A general sentence which did not exceed the maximum sentence allowable under either of the two counts on which he was convicted was imposed on petitioner Trumbo. Hence, if the validity of his conviction on the first count is sustained, it will be unnecessary to consider the second count. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

which, in the main, were rejected by the Court of Appeals for the Second Circuit in *Josephson* v. *United States,* 165 F. 2d 82, 87-92, certiorari denied, 333 U.S. 838, and by the Court of Appeals for the District of Columbia Circuit in *Barsky* v. *United States,* 167 F. 2d 241, certiorari denied, 334 U.S. 843, petition for rehearing pending; *Eisler* v. *United States,* 170 F. 2d 273 ,279, certiorari granted, 335 U.S. 857, cause ordered removed from docket, 338 U.S. 189; *Dennis* v. *United States,* 171 F. 2d 986, 987-988, certiorari granted, limited to a different question, June 27, 1949; *Marshall* v. *United States,* not yet reported, petition for certiorari pending, No. 197; and *Morford* v. *United States,* not yet reported, petition for certiorari pending, No. 236. Our position on that question has been fully stated in our brief in *Eisler* v. *United States, supra,* No. 255, October Term, 1948, pp. 22-64, to which the Court is respectfully referred.

2. These cases involve the question whether, consistently with the First Amendment, the Committee may validly question members of the motion picture industry as to their membership in the Communist Party or Communist-controlled organizations.

We do not think it can be gainsaid that the courts below correctly held, as a matter of law (*Sinclair* v. *United States,* 279 U.S. 263, 298), that the questions put to petitioners were calculated to elicit information pertinent to the subject matter of the Commit-

tee's inquiry. Obviously, an investigation of the nature and scope of the Communist program and its activities involves in no small measure investigations of the character and number of its adherents. And the accuracy of the information which the Committee obtains concerning the Party's operations depends upon the knowledge of the witnesses who appear before it. For those reasons alone it would seem that it was pertinent to inquire of petitioners whether they were and are members of the Party and of an alleged Communist-controlled organization. Petitioners argue, however (L. Pet. 46), that disclosures from their lips would have been superfluous because the Committee already had independent information (which it apparently believed) that they were connected with the Party. But admissions by petitioners would have served at the very least to corroborate the information obtained from other sources and thus to eliminate any doubts which otherwise might have lingered, if not in the minds of the Committee, then in the minds of other Congressmen to whom the Committee's findings and recommendations might be transmitted eventually for legislative action. Moreover, if membership in the Party or the Guild had been denied by petitioners, in the face of strong evidence to the contrary, those denials might have affected their credibility on other parts of their testimony, and might have served also to confirm the allegations concerning the conspiratorial nature of the Communist Party's infiltration of the

motion picture industry. In any event, in an inquiry of this nature, it would seem that questions to elicit Communist and "Communist-front" *membership* (which, against the background of the alleged nature of the Party's program and the role of members in its promotion, may connote more than mere *belief* in Communism) constitute a reasonable preliminary examination to establish witnesses' interest and bias so that their testimony can be properly evaluated.

Such cases as *Thornhill* v. *Alabama,* 310 U.S. 88, *Bridges* v. *California,* 314 U.S. 252, *West Virginia Bd. of Education* v. *Barnette,* 319 U.S. 624, and *Thomas* v. *Collins,* 323 U.S. 516, upon which petitioners rely (L. Pet. 53-54, 83-84), are in our view inapposite. In each of those cases the Court was concerned with the effect of legislative, executive, or judicial action which imposed a restraint upon speech, the press or assembly, or which punished individuals for having published their views or for having joined an association, or which required adherence to a belief. Here, however, while disclosure before the Committee of membership in the Communist Party or the Screen Writers' Guild may have caused petitioners unfavorable publicity and consequent economic damage and, thereby, have discouraged others from subjecting themselves, by affiliation with the Party or the union or by the expression of heterodox beliefs, to the risk of a similarly unfavorable reaction from the public

and their employers, and while the content of motion pictures may have been influenced by the producers' fears lest the use of the screen to express any ideas other than those deemed proper by the Committee might result in unfavorable publicity, it does not follow that the First Amendment was violated.[8] For it is not this sort of indirect consequence of public disclosure with which the First Amendment is concerned. Such indirect consequences may result from any public investigation. The Amendment does not provide, however, that Congress may not inform the public; it provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press". It was designed to prevent attempts by law to curtail freedom of speech. But it was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made to or by an investigating body. Nor does the possibility that persons may voluntarily refrain from expressing their views in order to avoid a hostile public reaction mean that any law has abridged their freedom of speech.

Whether or not the Amendment embodies a freedom to be silent generally, as is urged, it certainly does not accord a privilege to be silent when called upon to testify before a lawful body of inquiry. For no investigation would be constitutional if that were the case. And, obviously, the First

[8] No question concerning the privilege against self-incrimination is involved in these cases.

Amendment itself does not make unlawful the otherwise proper use of compelled testimony even if the inquiry does interfere with the alleged freedom to be silent.

The same conclusion may be reached by a different route, if it be assumed that such indirect effects are of the sort to which the First Amendment might apply. First Amendment rights are not absolute. They have never been thought to preclude compulsion to testify. The power to compel testimony for public purposes—legislative as well as judicial—is essential to the existence and operation of organized society. Not infrequently, compelled disclosures may bring persons into disfavor or disrepute, may result in loss of employment or other manifestations of individual or popular ill-will. But the need for accurate first-hand information as a basis for governmental action has been deemed to outweigh the personal inconvenience resulting from compelled disclosures. And this is so even if the rights claimed are thought to be within the field generally reached by the First Amendment. For claims to rights under the First Amendment must be balanced against other legitimate and essential needs of the community.

This Court has noted that even where freedom to criticize the courts was involved, "reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudi-

cation, free from interruption of its processes". *Pennekamp* v. *Florida*, 328 U. S. 331, 336. In so far as compulsory testimony is concerned, the interest of privacy is overbalanced by the need for an efficient exercise of judicial power. Similarly, when the necessities of the legislative process are contrasted, not with any direct restraint upon the right to speak one's views, but with the indirect deterrent resulting from fear of public opinion aroused by the disclosure, we submit that the former interests outweigh the latter. Cf. *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 165 (D.D.C.), affirmed, 334 U. S. 854.

The alleged abuses by the Committee of which petitioners complain, *i. e.*, that it sought to intimidate motion picture producers to discharge and "blacklist" certain writers and to make only the kind of pictures which the Committee believed should be seen by the American people (see, *e. g.*, L. Pet. 8-12, 64-68), are not material to the issue here presented. It is our position, simply stated, that the Committee was empowered—and constitutionally so—to inquire into the extent to which this medium of mass communication was being used to spread Communist propaganda, and that the specific questions for the refusal to answer which petitioners were convicted were pertinent to that inquiry, and did not infringe any constitutional rights of petitioners. If, in other respects, the members of the Committee or its investigators transgressed the bounds of the power which was entrusted to the Committee by Congress, the

remedy lies with Congress and, ultimately, with the voters.

3. Petitioners' contention (L. Pet. 88-94; T. Pet. 25-28) that the decision in *Christoffel* v. *United States*, 338 U. S. 84, determines that a validly constituted subcommittee was not present when petitioners appeared and refused to testify, rests upon an unwarranted expansion of the scope of that decision. In the cited case the Court construed the rules of the House of Representatives as requiring that a majority of the members, constituting a quorum, of a committee must be present at the time an alleged perjury is committed; otherwise the committee is not a competent tribunal. The requirement was held not satisfied by a showing merely that a majority was present at the opening of the session, even though no question of lack of quorum was thereafter raised. But certainly nothing in that decision implies that a committee of the House cannot act through a subcommittee,[9] provided that the subcommittee is appointed in accordance with rules of the House. Nor are the rules of the House required to be written and explicit. Custom and practice may serve to reveal the prevailing rule. Thus, the crucial questions here are (a) whether the Chairman had the authority, under the rules of the House, to appoint subcommittees at the times petitioners appeared; and

[9] The Committee on Un-American Activities is expressly authorized to function through subcommittees. Rule XI (q) of the Rules of the House of Representatives, *supra*, pp. 4-5.

(b) whether his authority was in fact exercised—*i. e.* whether he appointed, as subcommittees, the two groups of members before whom petitioners appeared.

(a) Clearly, the first question—whether the Chairman had power to designate the subcommittees—presented a matter of law for determination by the trial court. And we think the court correctly construed the House rule on that subject, as expressed in its prevailing custom and practice. For, as the House Parliamentarian testified (T. R. 362): "* * * by immemorial custom subcommittees have always been appointed by the chairman of the full committee." Petitioners' argument (L. Pet. 90) that only the committee itself, by majority vote, can delegate its authority to a subcommittee may be true in the sense that the committee retains an ultimate veto over its chairman's action. But initially the chairman has the authority to designate subcommittees to act and it is clear in these cases that no veto or challenge was exercised by the full Committee. To the contrary, the Committee's action in reporting to the House petitioners' refusals to testify may be construed as a tacit recognition by the Committee that its Chairman had authority to designate the subcommittees before whom petitioners appeared.

(b) Petitioners urge that both trial courts invaded the juries' province by failing to submit "the factual question as to the authority of the

chairman to determine that a sub-committee should sit and to designate it" (L. Pet. 90). But, as we have stated, the existence of his authority was a question of law for the trial court to decide, and the only factual question was whether the particular groups before which petitioners appeared had been designated as subcommittees by the Chairman. And the latter question was indeed left to the juries' determination.[10] The instruction on this point in the Trumbo case was as follows (T. R. 545-546):

> * * * If you find, beyond a reasonable doubt, that the Committee on Un-American Activities met on this date in the District of Columbia with Congressman Thomas presiding; that he called the meeting to order; that he designated and appointed the subcommittee to sit on that occasion, consisting of himself, Mr. McDowell, and Mr. Vail; and that they were all physically present during this period, when the defendant appeared, was sworn, and was interrogated before the committee, then you may find that a validly constituted subcommittee of the Committee on Un-American Activities was sitting at and during the period of defendant's appearance and interrogation

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[10] *Fleishman* v. *United States*, 174 F. 2d 519 (C.A. D.C.) and *Bryan* v. *United States*, 174 F. 2d 525 (C.A. D.C.), petition for writs of certiorari pending (Nos. 98, 99), are distinguishable, for in each of those cases the trial court instructed the jury that, as a matter of law, a quorum of the committee was present when the witness appeared and that the committee, therefore, was validly constituted.

> before this committee, with authority to make the inquiries involved in this case.[11]

4. Petitioner Lawson urges (Pet. 95-100) that he was prejudiced by a portion of the court's instruction which he claims equated failure to give a responsive answer with the refusal to answer which is interdicted by the statute. But if the charge to the jury is viewed in its entirety, and in the light of the fact that petitioner's testimony before the Committee was submitted *verbatim* to the jury, the court's use of the practical illustration of which petitioner complains loses the prejudicial color which, in the abstract, it might have had. For the court carefully instructed the jury (L. R. 358):

> * * * If you believe from the evidence that the defendant was attempting to answer the question, but he was not allowed to answer it by the committee, then, of course, it would be your duty under the law to return a verdict of not guilty on this charge.

Moreover, it was made clear to the jury that an essential element of the offense charged against petitioner was a *wilful* (*i. e.*, "deliberate and intentional, and not inadvertence or accident") refusal to answer the Committee's question (L. R. 356-375). In view of these and other precautionary instructions, it is evident that the trial court conveyed to the jury a proper direction that only if it should find a deliberate evasion by petitioner

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[11] A similar instruction was given in the *Lawson* case. (L. R. 335.)

of the question concerning his membership in the Communist Party or a virtual frustration of that particular inquiry, would a finding of a wilful refusal to answer be warranted. A reading of petitioner's testimony before the Committee (L. R. 188-197), makes it difficult to perceive how the jury could have reached any other finding.

5. Petitioner Trumbo complains (Pet. 28-32) of the portion of the charge in which the jury was instructed that he could only state his objections to the Committee's questions but could not elaborate upon them. This instruction is distorted by petitioner into a direction to the jury to convict since, petitioner claims, the evidence showed he had repeatedly made objections and elaborated upon them. This contention is entirely without merit. The court was careful to emphasize throughout the charge that only a deliberate refusal to answer one or both of the specific questions put by the Committee would warrant a conviction, and the court's reference to petitioner's repetition and elaboration of objections was merely parenthetical. The court stated, "He did not have the right to insist upon any elaboration of his objections or repeatedly to state his objections instead of answering the questions" (T. R. 547). This, we submit, was a proper statement of the applicable legal principle.

6. Petitioner Lawson contends (Pet. 101-103) that the trial court committed prejudicial error by unduly restricting his cross-examination of Chair-

man Thomas. The extent of cross-examination rests, of course, in the sound discretion of the court (*Glasser* v. *United States,* 315 U. S. 60, 83) and, in our view, the instances cited by petitioner fail to support his claim of an abuse of that discretion.

He insists (Pet. 101) that he should have been allowed, upon cross-examination, to prove that "the Committee was not actually investigating anything, but on the contrary was carrying on a proceeding designed to blacklist the defendant and to censure the screen." But this would have amounted to an attack upon the motives of the Committee and an attempt to show that the Committee had abused its powers in other respects. The alleged ulterior purposes of the Committee members are not proper matters for judicial inquiry. If an examination of such matters were allowed, every recalcitrant witness before a congressional committee could turn his trial for contempt into a protracted trial of the motives of the members. And, as we have stated before, any abuse of the Committee's power elsewhere would not affect petitioner's duty to answer the question put to him.

Petitioner complains also that he was not permitted to adduce, on cross-examination of the Chairman, the contents of the written statement which he had tried to present to the Committee. This was error, he contends, because it removed from the jury important evidence bearing upon the issue of his wilful refusal to answer the Commit-

tee's questions. The most that would have been relevant, however, would have been that petitioner was seeking to assert objections to the Committee's inquiry, not the grounds of his objections in detail. And since his testimony before the Committee, which was read in its entirety to the jury (L. R. 188-197), makes adequate reference both to his prepared statement and to his objections, it does not appear that petitioner was in any way prejudiced.

Nor did the trial court abuse its discretion in limiting further cross-examination in respect of the pertinency of the Committee's questions, after ample opportunity had been afforded for cross-examining Chairman Thomas on this issue (L. R. 228-244). The test, after all, was not the truth or falsity of the allegations made against petitioner by other witnesses, but only whether the Committee had a reasonable basis for investigating alleged Communist infiltration of the motion picture industry and whether the question asked petitioner was pertinent to that subject matter. And, of course, since the issue of pertinency was a matter for determination by the court, evidence on that point was properly kept from the jury. *Sinclair* v. *United States,* 279 U. S. 263, 298.

7. The trial court excluded evidence that, in reporting to the House petitioner Lawson's refusal to answer, the Committee did not include his motion to quash the Committee's subpoena, his pre-

pared statement, and his application to recall for cross-examination those witnesses who had testified against him. This exclusion, Lawson contends (Pet. 104), was prejudicial error since he was thereby prevented from showing that the Committee had failed to comply with the statutory requirement (2 U. S. C. 194, *supra*). Not only was such evidence immaterial to any issue before the jury, but, even considered as an attack on the indictment, the contention lacks merit. The statute provides merely that when a witness refuses to answer a pertinent question, the "fact of such failure" shall be reported to the House, but this does not mean that every paper delivered to a committee by or on behalf of a contumacious witness must be incorporated in the report. The essential facts were embodied in the transcript of petitioner's testimony which was sent to the House by the Committee (L. R. 383-392), and which referred to the matters which petitioner now complains were "suppressed". We believe the House had adequate information on which to base a decision whether to vote for the resolution certifying petitioner's contempt to the United States Attorney (L. R. 383-393).

8. Both petitioners contend (L. Pet. 34, 105-107; T. Pet. 32) that government employees are disqualified as a class from jury service in cases of this type. Their impartiality is claimed to be impaired by the fear, stemming from the "loyalty order"

(Executive Order 9835), that a verdict in the defendant's favor might be construed as sympathetic association with members of organizations which have been labeled "subversive" by the Committee and by the Attorney General. This is substantially the same question as is involved in *Dennis* v. *United States,* 171 F. 2d 986 (C.A. D.C.), in which certiorari has been granted (No. 14, this Term), limited to the question whether government employees could properly serve on the jury which tried Dennis for a similar violation of R. S. § 102 in failing to respond to the Committee's subpoena. The decision in that case will presumably be dispositive of that issue here.

9. An attack on the entire jury panel was made by petitioners because the questionnaire sent to prospective jurors asked, "Have you any views opposed to the American form of government?" and because the handwritings of prospective jurors were appraised to determine tentatively whether they had adequate intelligence for jury service. But the question in respect of belief in our form of Government was apparently innocuous. No one was disqualified for any answer to that question; indeed, as a practical matter, it was interpreted as barring only those who expressed a belief in the overthrow of the courts of the United States (T. R. 87). And although, in the preliminary stages of selection (which, it should be noted, was subject to correction upon further investigation (see T. R.

193)), the Jury Commissioners may have attributed some weight to handwriting where none was warranted, there does not appear to have been any exclusion, systematic or otherwise, of any group or individual on economic, social, religious, political, or geographic grounds. Among the qualified jurors on the panels from which the trial juries were selected were a messenger, waiter, maid, taxi-driver, truck-driver, soda clerk, typist and others in the lower economic groups (see, L. R. 94-96; T. R. 148-149) which is some indication perhaps that, contrary to petitioners' contentions, no discrimination was practiced on that score. In any event, as the Court of Appeals correctly observed (L. R. 572): "An examination of the record discloses nothing which would indicate that 'an impartial jury drawn from a cross-section of the community' [citing *Thiel* v. *R. R.*, 328 U.S. 217, 220] was not obtained in each case below."

CONCLUSION

The decision below is correct and is not in conflict with any decision of this Court. Although the issue as to the Committee's authority to question petitioners as to their membership in the Communist Party is of great importance, it has been twice resolved against the petitioners' contentions by the court below (in this case and in *Barsky* v. *United States, supra*), and that court's views in this respect seem so clearly correct, and the petitioner's arguments so remote from the issues presented by

this case, as to make any review by this Court unnecessary. Subject to the reservation noted as to the issue of exclusion of government employees from jury service in cases of this type, the petition should be in all respects denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 248

JOHN HOWARD LAWSON,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 249

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Brief of Alexander Meiklejohn, of Cultural Workers in Motion Pictures and Other Arts, and of Members of the Professions, as Amici Curiae.

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Brief of Alexander Meiklejohn, of Cultural Workers in Motion Pictures and Other Arts, and of Members of the Professions, as Amici Curiae.

The following named cultural workers in motion pictures and other arts and members of the professions, respectfully urge the favorable consideration by this Court of the pending petitions for writs of certiorari in the above entitled cases for the reasons hereinafter set forth:

Alexander Meiklejohn and

FROM THE MOTION PICTURE INDUSTRY:

Sam Albert
Edward P. Bailey
Sol Barzman
Robert M. Bassing
Jeanne Bayless
Leon Becker
Laslo Benedek
Connie Lee Bennett
Seymour Bennett
Leonardo Bercovici
John Berry
Betsy Blair
Henry Blankfort
Michael Blankfort
Julian Blaustein
Phoebe Brand
Irving Brecher
Harold Buchman
Louis Bunin
Hugo Butler

Morris Carnovsky
Vera Caspary
Howland Chamberlin
Frances Chaney
Charles Chaplin
Maurice Clark
Angela Clarke
Frederick Cleary
Franklin Coen
John Collier
Richard Collins
Dorothy Comingore
Burt Conway
Jeff Corey

Howard Da Silva
Frank Davis
Jerome Davis
Nancy Davis
Olive Deering
I. A. L. Diamond
Howard Dimsdale
Walter Doniger
Jay Dratler
Peggy Dreis
Howard Duff
Marjorie Duffy
Philip Dunne
Arnaud d'Usseau

Leslie Edgley
Edward Eliscu
Guy Endore
Joseph Eger
Julius Epstein
Ross Evans
Jean Empson

Howard Feldman
Carl Foreman
Melvin Frank
David Fresco
Hugo W. Friedhofer
Anne Froelick

Jerry Gallard
John Garfield
Jody Gilbert
Augustus Goetz
Ruth Goetz
Ivan Goff
Lee Gold
S. L. Gomberg
Frances Goodrich
Don Gordon
Hilda Gordon
Lloyd Gough
James Gow
Farley Granger
Edward Gross
Margaret Gruen
Jerry Gruskin

Albert Hackett
Alvin Hammer
Louis Harris
Harold Hecht
Sig Herzig
Rose Hobart
Arthur Hoffer
J. Jerry Hoffman
Tamara Hovey
John Hubley
Edward F. Huebsch
Marsha Hunt
Ian McLellan Hunter
John Huston

Paul Jarrico
Robert Joseph
Gordon Kahn
Jay Kanter
Sol Kaplan
Robert Karnes
Roland Kibbee
Victor Killian
Mickey Knox
Arthur Kober
Howard Koch
Lester Koenig
H. S. Kraft

Burt Lancaster
Burton Lane
Arthur Laurents
Will Lee
Robert Lees
Gladys C. Lehman
Isobel Lennart
Sonya Levien
Alfred Lewis Levitt
Melvin Levy
Norman Lloyd
Joseph Losey

Louella MacFarlane
Ben Maddow
Daniel Geoffrey Homes Mainwaring
Arnold Manoff
Edward May
Edwin Justus Mayer
Gregory McClure
Kitty McHugh
Eve Miller
John Skins Miller
Frances Millington

Elick Moll
Karen Morley
Henry Myers

Leonard Neubauer

Mortimer Offner
Arthur Orloff

Norman Panama
Jerry Paris
Dorothy Parker
Irwin Parnes
Frank Partos
Kenneth Patterson
John Paxton
Leo Penn
Nat Perrin
Lester Pine
Phillip Pine
Elise Dufour Pinchon
Robert Pirosh
Abraham Polonsky
Stanley Prager
Robert Presnell Jr.
George W. Prior
Marian Prior

David Raksin
Elias Reif
Irving Reis
Anne Revere
Frederic Rinaldo
Ben Roberts
R. B. Roberts
Stephen Roberts
Robert Rossen
Selena Royle
Irving Rubine
Stanley C. Rubin
Shimen Ruskin
Robert Russell

Waldo Salt
Ruth Sanderson
Jack Scher
Wilton Schiller
Maxwell Shane
Victor Shapiro
Seymour Sheklow
Art Smith
Louis Solomon
Eugene Solow
Gale Sondergaard
Jan Sterling
Donald Ogden Stewart
John Strauss
Theodore Strauss
Jo Swerling

George Thomas
Cyril Towbin
Dorothy Tree
Paul Trivers
George Tyne

Michael Uris
Peter Viertel
Salka Viertel

Robert Wachsman
Sam Wanamaker
Joseph Warfield
Mel Waters

John Weber
John Wexley
Lynn Whitney
Frances Williams
Mervin Williams
Michael Wilson
Richard Wilson
Robert E. Wilson
Shelley Winters
David Wolfe
William Wyler
Frances Young
Nedrick Young
Fred Zimmeman

FROM OTHER ARTS AND PROFESSIONS:

Murray Abowitz, M.D.
Gregory Ain
Harmon Alexander
Robert E. Alexander
William Alland
Jack Agins, M.D.
Georgia Backus
Rev. Lee H. Ball
Bernard Baum
Irving Bieber, M.D.
Stella Bloch
Peter Blume
Alex Blumstein, M.D.
Theodore Brameld
Janet Brandt
John Brown
Cicely Browne
Allan M. Butler, M.D.
Jane Rosen Callender
Angus Cameron
Dr. A. J. Carlson
Harry Cimring, M.D.
Peggy Chantler
Jerome Chodorov
Helen F. Clark
P. Price Cobbs, M.D.
Marc Connelly
Thomas H. Creighton
Charles C. Cumberland
Michael Davidson
Albert Deutsch
William E. Dodd
Harl R. Douglass
Olin Downes
W. E. B. DuBois
Alice Dudley
Garrett Eckbo
Robert L. Einer
David Ellis
Robert H. Ellis, M.D.
Jerome Epstein
Paul S. Epstein
Tillman H. Erb
Lincoln Fairley
Hazel E. Field
Austin E. Fife
David Harold Fink, M.D.
Phyllis Frank
Lawrence J. Friedman, M.D.
Dr. Arthur W. Galston
Ted Gilien

J. W. Gitt
Max Goberman
Sanford Goldner
Boris Gorelick
Shirley Graham
Elliott Grennard
Victor Gruen
Rev. Armand Guerrero
Uta Hagen
Dashiell Hammett
E. Y. Harburg
M. Robert Harris, M.D.
Kenneth Harvey
Frances Heflin
A. A. Heller
Regina Heller
Lillian Hellman
Victor Heyden
Stefan Heym
Ira Hirschman
W. E. Hocking
Tom Holland
John R. Holmes
Ernest A. Hutchinson, M.D.
Garson Kanin
Lilian Kaplan
Doris Karnes
George Kast
Anne Kazarian
Rev. Albert Wallace Kauffman
Milton Kestenbaum
John A. Kingsbury
Raphael Konigsberg
Peter Jona Korn
Kenneth N. Kripke
Jean LaCour
John Latouche
Jack Levine
Maxim Lieber
Irwin Lieberman
Oliver S. Loud
Robert J. Lynd
Norman Mailer
John Martin
Molly Mason
Lownder Maury
Leo Mayer, M.D.
Samuel D. Menin
Arnold D. Mesches
Myron Middleton, M.D.
Arthur Miller
Pat Miller
Virginia Mullen
Helen Clare Nelson
Clifford Odets
Father Clarence Parker
Erwin Panofsky
Linus Pauling
Alexander E. Pennes, M.D.
Thomas L. Perry, M.D.
Nels Peterson
Ralph S. Phillips
Richard M. Powell
Alan Reed
Anton Refreigier
Carroll H. Richardson
Wallingford Riegger
Ben Rinaldo
Holland Roberts
Stephen Roberts

Vivian Roberts
Paul Robeson
Jack Robinson
Mary Robinson
O. John Rogge
Edwin Rolfe
David Rosen
Dr. Arthur Rubinstein
John Sanford
Elf Scharlin
Charles Schlein
Dr. Artur Schnabel
Max Howard Schoen, D.D.S.
Budd Schulberg
Frederick L. Schuman
John R. Scotford
Evelyn Scott
Prof. William R. Sears
Ben Shahn
Felice Shaw
Seymour Sheklow
Max A. Sherman, M.D.
Merle Shore
Wilma Shore
Samuel Silver
John Sloan
Pearl Somner
Rev. F. Hastings Smyth
Raphael Soyer
William Steig
Phillip Stern
Gene Stone
Helen Stone
Burt Styler
Carl Sugar, M.D.
George Tabori
Mary Tarcai
Joseph A. Thompson
Oswald Veblen
Louis Vittes
Don Waddilove
Joseph W. Warfield
Morris Watson
Max Weber
Herbert Weisinger
Gene Weltfish
Fritz W. Went
Frank W. Weymouth
James Waterman Wise
Ella Winter
Angers Wooley
William Zorach

Convinced that issues of as great importance as any with which this court has had to deal of recent years are here presented, those responsible for this brief have deemed it appropriate to elaborate upon a major social issue raised by the appellant which happens to be of special concern to them. This issue has to do with the question of censorship, first, as it affects rights guaranteed

to the petitioner by the Constitution of the United States; and, second, as it relates to the utilization of governmental power by a committee of Congress to impose a censorship upon the motion picture industry. However since both aspects of the matter are inescapably interrelated, they have been dealt with in this brief as presenting a single issue,——censorship. In brief compass, it is our contention:

1. That Congress cannot impose a direct censorship upon the motion picture industry since motion pictures enjoy the same protection under the First Amendment as the press and radio (*United States v. Paramount Pictures,* 334 U. S. 131, 166). Any prosecution arising out of an effort on the part of Congress to impose a direct censorship on the motion picture industry in violation of the First Amendment could not, therefore, be sustained. Since Congress cannot impose a direct censorship upon the motion picture industry, it follows that Congress cannot accomplish by indirection that which it is powerless to accomplish by direct legislation (*United States v. Butler,* 297 U. S. 1; *Child Labor Tax Case,* 259 U. S. 20). On this point it is perhaps sufficient to observe that members of Congress have frankly stated that one of the main purposes of the House Committee on Un-American Activities has been to accomplish by exposure and publicity ends which Congress could not lawfully accomplish by legislation (see: H. R. Rep. No. 2, 76th Congress 1st Sess. 13, 1939; H. R. Rep. No. 1, 77th Congress 1st Sess. 24, 1941; also, 47 *Columbia Law Review* 416 p. 428).

2. That a careful consideration of the record in this case will show that the hearings out of which appellant's

conviction for contempt arose involved an attempt by Congress to impose a censorship upon the motion picture industry in violation of the First Amendment. Since any effort by Congress, directly or indirectly, to impose a censorship upon the motion picture industry would involve an abuse of power, petitioner was not required to lend his assistance to the committee's unconstitutional purpose. Furthermore petitioner was doubly justified in refusing to assist the committee in this enterprise when it became apparent that, as part of its scheme to censor the industry, the committee was compelled to use its power as an agency of government to censor his thinking. In this manner the issue of censorship was brought directly home to the petitioner, as a citizen, for a surrender of his personal privilege or right would necessarily have involved an acquiesence in the scheme by which the committee sought to censor the industry.

The development of these contentions requires (1) a brief statement of the nature of motion pictures as a medium of mass communication and the character of the hearings out of which the citation for contempt arose; and (2) a consideration of certain features of modern political censorships.

* * *

Motion pictures belong in the category of the free arts. In a sense, the motion picture is a composite form in which all the free arts find expression: dance, drama, painting, sculpture, opera, pageant; the plastic and graphic as well as the verbal and literary arts. As a composite form, the making of motion pictures has an influence on the other arts and is in turn influenced by developments in these related arts (see: "The Motion

Picture Industry," *Annals,* American Academy of Political and Social Science, November, 1947, p. 82). Motion pictures have an extraordinary relevance to the maintenance of the democratic ideal since they are essentially a mass medium of communication. The weekly world attendance at motion pictures is estimated at 235,000,000 (*Annals, supra,* p. 1): the weekly attendance in the United States has exceeded 85,000,000 (*Hearings,* p. 1). In its effectiveness as a form of mass communication the motion picture can only be compared with press and radio; yet, as Terry Ramsaye has pointed out, motion pictures exceed both press and radio in the degree to which they are capable of penetrating "the great illiterate and semi-literate strata where words falter, fail, and miss" (*Annals, supra,* p. 1). As an educational medium alone, the motion picture possesses the utmost actual and potential importance (see: *Annals, supra,* pp. 103-109). Of motion pictures it has been said that: "Perhaps no other industry touches so intimately and significantly the lives of so large a proportion of the world's population. Indeed, the motion picture is relatively less important as an economic institution than as a social institution, functioning, with varying degrees of effectiveness and desirability, in the transmission of artistic ideas, the portrayal of human character and human emotions, the description of culture patterns of diverse societal groups, the dissemination of information concerning current affairs, and the interpretation of individual and social experiences. No other industry has so firm and so universal hold upon the popular imagination or so complete command of popular interest" (comments of Dr. Gordon S. Watkins, *Annals, supra,* p. vii). It is precisely the social importance of motion pictures which invests the issue of censorship, in this case, with such commanding significance.

Freedom of artistic expression is, of course, embraced within the guarantees of the First Amendment (*Free Speech in the United States* by Zechariah Chafee, Jr, 1941, 17, 28-30, 154, 366, 529 ff., 545); and this freedom turns on the freedom to develop and express ideas. The birth of an idea and its expression are not two distinct processes: an idea is born in the act of expression or creation. Freedom to the artist, however, means more than mere freedom of expression for it includes all that the artist really wants which is a chance to be heard. "Certainly," writes Dr. W. Rex Crawford, "the symphonic composer will find it a hollow freedom that permits him to put what notes he will on paper, if he cannot find a conductor who will give his work a hearing. The dramatist cannot remain satisfied with reading his bold lines and presenting his novel situations to a group of friends in his library, if every effort to obtain a theater encounters new objections . . . It is small comfort to have won an architectural contest if the design that ranked second is the one the committee chooses to erect" ("Freedom in the Arts," *Annals,* American Academy of Political and Social Science, November, 1938, p. 97). This is not to say that society must provide the composer with an orchestra, the playwright with a theater, and the author with a publisher or stand accused of having denied the meaning of freedom in the arts. But it is to insist that the artist's freedom is violated when he is denied a chance to have his work heard, regardless of its merits, solely because of his political beliefs or affiliations. Under these circumstances it is not merely an individual right of expression that is violated; the denial extends to one aspect of the process by which a society expresses itself, by which a culture is transmitted, by which social change is effected.

FREEDOM OF EXPRESSION.

Freedom of expression, in its related meanings, has a special significance in the making of motion pictures. Cost factors alone severely limit the number and kind of "ideas" that find expression in motion pictures. Furthermore motion pictures are at the mercy of a mass market of a magnitude and heterogenity unknown to the universe of print or radio. It has been said, in fact, that "movies are far more dependent upon a mass referendum than are other media of communication" (see, *Annals*, American Academy of Political and Social Science, November, 1947, pp. 22, 121, 122). These factors more or less inherent in the nature of the medium, have been re-enforced by the manner in which the motion picture industry has developed as an institution. Because motion pictures started as a medium of "amusement" and "entertainment," without any artistic pretensions, the industry long sought to cultivate a distinction between "entertainment" and "propaganda" as a means of minimizing its social obligations and avoiding responsibility for the fullest development of the new art form. The distinction, of course, is essentially unreal (see, *Annals, supra*, p. 117). Any dramatic presentation which is coherent enough to hold the attention and interest of an audience is in some degree entertaining; and, conversely, the "purest" entertainment film is likely to have hidden psychological or social implications. Hence the treatment of non-conventional subjects is certain to bring forth charges of "propaganda" just as the making of "pure entertainment" films will be denounced as an evasion of social responsibility. In either case the charge stems from the fact that a new art form has not yet been given

a real measure of freedom in the selection and treatment of ideas and subject matter. For it is obviously absurd, and also unfair, to charge the industry with a lack of social responsibility—or with political bias—and at the same time to deny the industry that measure of freedom which alone would stimulate a real sense of responsibility. That the industry has been "unregulated" in the past does not mean that it has been "free."

Those who engage in the production of motion pictures in a democracy have a clear responsibility to further the values upon which such a society is based (a responsibility which derives from the freedom of expression which in theory is guaranteed in such a society); but dictation, direct or indirect, is utterly at variance with the idea of social responsibility. Censorship makes for an evasion, not an acceptance, of real social responsibility. Like the press and radio, the motion picture industry is subject to regulation in the public interest; but the *content* and *ideas* of motion pictures cannot be dictated by a congressional committee any more than such a committee could dictate the editorial policy of the American press. The real question we propose to discuss is, therefore: Did the appellant's conviction arise out of an abuse of the congressional power of investigation or, stated another way, did the committee, in its hearings in this matter, seek to impose a censorship upon the American film industry?

On this point it is important to note that the hearings are entitled: "Hearings Regarding the Communist Infiltration of the Motion Picture Industry." At the opening session, the chairman expressly stated that the purpose of the hearing was to determine the extent to which

Communist influences,—which the chairman carefully failed to define,—had infiltrated the motion picture industry in Hollywood (*Hearings,* pp. 3, 9). Obviously this statement had reference not to the question of ownership or control but to the question of propaganda. In determining the purpose of the hearing, therefore, it is significant that the chairman, with the apparent approval of his colleagues, characterized the purpose in such a manner as to make it unmistakably clear that the committee was directly concerned with the *content* and *ideas* of the American film industry. It would be impossible, obviously, to determine the propaganda content of American films without making a systematic examination of the output of the industry for a stated period, picture by picture, story by story, scene by scene.

The Meaning of the Hearings.

The real meaning of the hearings, however, is to be found not in the stated purpose but in the actual utilization of official power by the committee: what it did as an official agency of government, how it proceeded, what it accomplished. Although elaborately disclaiming any intention of imposing a censorship upon the industry (*Hearings,* p. 73), this is precisely what the committee not only sought to accomplish but actually succeeded in doing. The record is replete with suggestions, advanced by the chairman and other members of the committee, that the industry should make "anti-Communist" pictures (*Hearings,* pp. 28, 76, 106, 132, 144, 145, 146, 223, 227, 324). Wholly unambiguous, these suggestions were made in a tone and manner that carried clear overtones of compulsion. The record is also full of suggestions, emanating from the chairman and other members of the committee,

that the industry should make more pictures "extolling the American way of life" (*Hearings,* pp. 29, 237, 307). At the same time the industry was severely criticized —and, more important, *publicly* criticized,—for having made certain motion pictures which were discussed, by name, at considerable length. It will also be noted that the committee discussed with spokesmen for the industry specific details having to do with the content and ideas of films; references, for example, were made to films depicting evil bankers and corrupt congressmen, with the clear implication that the committee did not approve of such characterizations. The objective of the use of official governmental power in all of this was clearly censorial.

The same abuse of power, moreover, is betrayed in the committee's pre-occupation with the role of the writer in the motion picture industry. Not only were the hearings largely concerned with writers, but the committee consistently and carefully stressed the importance of writers to the purpose of the inquiry (*Hearings,* pp. 35, 58, 150, 225). The basis for the committee's interest in writers is, of course, quite clear. In a composite art form like motion pictures, the writer occupies a role or position that is of special interest to the censor. Not that the writer is capable of infiltrating propaganda into films—the manner in which the industry is organized makes this a preposterous supposition,—but because the writer, more directly than the other craftsmen, is concerned with the content and ideas of motion pictures. The "story" is the principal raw material of the industry; every production starts with an idea; and writers are the principal germinators and developers

of ideas in the industry (see: *Annals, supra,* pp. 37-40, 16).

It should also be noted that the committee was concerned not with writers in the abstract but with certain writers; moreover, its concern with these writers was most specific, namely, it wanted these writers discharged from their positions and blacklisted in the industry. The record discloses, most significantly, that the industry was reluctant to discharge the writers under investigation; it was also reluctant to adopt a policy which would be tantamount to a blacklisting of these writers in the industry (*Hearings,* pp. 53, 65, 313, 471, 472). Almost from the opening session, the committee brought pressure to bear upon the industry spokesmen to force them to discharge the writers who had been selected for investigation. At one point the chairman stated: "We hope that by spotlighting these Communists you will acquire that will," meaning the will to dismiss the writers under investigation (*Hearings* pp. 141-142). This was not one of the incidents of the hearings; it was obviously a major purpose. Not only was the suggestion repeatedly advanced that the writers should be dismissed (*Hearings* pp. 49, 50, 53) but at least one member of the committee kept insisting that the Motion Picture Producers Association should blacklist these men in the industry (*Hearings* p. 18). In the context of the hearings, these suggestions must be regarded as more than mere casual hints or gratuitous recommendations; they carried the implied threat of a directly imposed federal censorship in case of noncompliance. What the committee clearly set out to accomplish was a censorship of the industry accomplished through the stratagem of forcing the in-

dustry to discharge a selected group of writers who were identified with a point of view and set of ideas of which the committee disapproved. A purge of ideas was accomplished through a purge of individuals associated or identified with these ideas; in effect this type of censorship might be described as symbolic censorship. That the committee succeeded in forcing the industry, against its better judgment, to discharge the writers under investigation, is merely another way of saying that it succeeded in its strategy of imposing a censorship-by-indirection upon the industry (see: New York *Times,* November 26, 1947, 1:2).

As the history of German and Italian fascism clearly reveals, there can be no more effective censorship of any medium of communication than a purge of the individuals identified with ideas and points of view which the censors want to expurgate. This is not, of course, because the individuals selected for the purge are necessarily persons of outstanding influence and ability; the purge is intended to be symbolic. In the conquest of ideas, the taking of ten hostages can in effect approximate the direct suppression of certain ideas and points of view. This is precisely what Mr. Stripling had in mind when he asked a spokesman for the industry: "Don't you think the most effective way of removing those Communist influences . . . . and I say Communist influences; I am not saying Communists; I am not accusing them all of being Communists . . . but don't you think the most effective way is the payroll route?" (*Hearings* pp. 49-50). Seldom has there been a more explicit statement of a principle basic to the strategy of terror, namely, "you take my life when you do take the means whereby I live."

The Triangle of Pressure.

The three main "nerves" which modern censorship manipulates, it has been said, are coercion, bribery, and persuasion, or, translated into practical policy, terror, corruption, and propaganda. "The totalitarian engineers," writes Dr. E. K. Bramstedt (*Dictatorship and Political Police: The Technique of Control by Fear,* Oxford University Press, 1945, p. 137), "either threaten man with dangerous insecurity, turning the screw on him by various forms of terror, or they promise him a deceptive security by the cash value of corruption or the mental opium of propaganda. In all these cases they reckon that man will eventually prefer the security of complete submission to the grave risks of an independent attitude. Many advantages of an economic or social kind are promised and sometimes granted. The mind of the masses is filled with colorful suggestions of what is marked as good or bad for them. *It is the combination of these three agencies* which constitutes the mental climate of a dictatorship. Terror, corruption, and propaganda are only three different sides of the same triangle, and it is impossible to recognize its geometrical proportions without taking all three into consideration. All three aim at directing people according to a preconceived pattern of thought and action. They reduce them to an attitude of docile passivity and make them the mere object of intellectual hypnosis, however subtly applied. Man, when successfully approached by any of these three methods, does not act but reacts, he does not think but follows a stimulus. At the end he is enchained by fetters of which he is often only vaguely aware." (Emphasis added.)

Propaganda by government is a method used to divest the people of their right to propagandize. The former is destructive of democracy, the latter is necessary to it.

Only those who ignore the unmistakable contemporary reality embedded in the analysis just quoted can be blind to the fact that the logical and intentional consequence of the contempt citations in this case was the censorship of a particular point of view and of certain ideas in the making of motion pictures and, at the same time, an open encouragement of certain other ideas and points of view. Had the committee subpoenaed a group of newspaper publishers and demanded of them that they discharge and blacklist ten editorial writers, all associated with a certain point of view, the meaning could not have been more unmistakable. To underscore the strategy of the hearings, it should be pointed out that the industry did in fact adopt a general industry-wide "non-Communist" hiring policy. Coupled with the discharge and blacklisting of the ten writers, the adoption of this policy constituted the industry's symbolic acceptance of the unstated alternative offered by the committee, namely, acquiescence in the plan of censorship which we are suggesting or Congress will adopt a program of direct censorship.

So far as other writers in the motion picture industry are concerned, the effect of the discharge of appellant and his colleagues could only be: first, to discourage the submission of any plot, story, or theme which might possibly give rise to an inference that the author was identified with or sympathetic toward the wide range of ideas which the committee insisted that the industry should suppress; and, second, to encourage every writer in the

industry to submit only those ideas, stories, and themes which, by inference, would meet with the approval of the committee. The penalty for failure to comply with this general policy of caution can be most severe, namely, dismissal from the industry. The fact that writers in the industry are well paid (*Hearings* p. 73)—that the prizes for conformity are high—only emphasizes the ease with which an indirect censorship has been imposed on the industry by a committee of the Congress. For there was a dual—although closely related—purpose in the strategy of the committee: just as it sought to coerce and bribe the writers of the industry so it sought to terrorize and corrupt the owners and/or managers of the industry. In effect the spokesmen for the industry were compelled to submit to the will of the committee as the price to be paid for escaping direct censorship and other forms of harassment including the possibility of further public hearings. And there was, of course, a third purpose: namely, propaganda for the millions who followed the hearings in the press, on the radio, or on the screen.

The plan of censorship devised by the committee has a special significance to the individual writer or creative artist in our society. In the past, as the Authors League of America Inc., has stated in a resolution bearing on this case, censorship has commonly "operated only against a work produced and issued to the public, and only to one work at a time . . . Here, however, we are faced with a different form of censorship. Here the man *himself* is proclaimed suspect . . . Indeed, the whole corpus of a man's work, past and future, is thus declared suspect" (*Hollywood on Trial,* p. 146). To emphasize the

meaning of this statement, suffice it to say that Twentieth-Century Fox Film Corporation, subsequent to the contempt convictions in this case, purchased a story by Albert Maltz, one of the writers here involved (New York *Times,* April 1, 1949, April 10, 1949); and then suddenly announced, under obvious pressure, that it would not produce the story (*Variety,* Hollywood, April 13, 1949, Vol. 63, No. 28, p. 1), - - an act of cultural vandalism in one of its ugliest and crudest forms.

Censorship in Modern Dress.

The full meaning of the hearings out of which appellant's conviction arose, however, can only be understood in terms of the new censorship which has arisen to plague our times. Although censorships change as times change and new conditions arise, the basic idea of all censorships is the same: to protect an authority based on privilege by a policy of suppressing ideas and opinions (Vol. III, *Encyclopedia of the Social Sciences,* p. 291). Hence the scope of most censorships is commensurate with the area of privilege under attack. For example, the most rigorous of old-style censorships, that of Czarist Russia, left certain areas of intellectual life open to free inquiry and, even as to prohibited fields, was easily evaded (see: *A History of Russian Literature* by Prince D. S. Mirsky, 1927, p. 54). Within the last quarter century, however, a new censorship has arisen which differs in crucially important respects from the censorships of the nineteenth century.

Since the social crisis, as viewed by the modern censors, is now "total," the scope of the new censorships is all-inclusive. Not only has the scope of censorship changed: the methods and techniques of suppression have also

changed. The rigor of any censorship will depend on many factors, including the relative ease and speed of communication. Since nearly anything said or written stands a chance nowadays of being heard or read by large masses of people, and in a brief period of time, modern censorships aim, not merely at preventing or punishing the expression of ideas, but at reaching back one step further to control the process of thought itself. Here the scientific technical apparatus of modern times has revolutionized the methods of censorships (see Bramstedt, *supra,* p. 1.)

The enforcement of conformity has been rightly called the beginning of modern dictatorships. Once the process is launched it must be systematically extended until the last vestige of resistance has been overcome. As Sir Frederick Pollock once pointed out, there is nothing more vicious or damnable than heresy, that is, if you believe in heresy. To those who believe in political heresies, there can be no limit to the right of the state to suppress so grave an evil. The body politic must be "purged" and "cleansed" of all "undesirable" elements and no sooner is the first purge effected than it develops that the purging process must be continuous. Starting usually with the civil service, the purge is rapidly extended to the labor movement, the professions, until, in a thorough and systematic manner, every social and occupational stratum has been coordinated. At this point the party or agency in charge of the purge usually undertakes a purge of its own ranks so as to further "coordinate" the structure of power that is being created in the guise of extirpating heresies.

As rapidly as possible the censorship program is extended to the entire educational system which is "coordinated" through an attack on the concept of academic freedom and a gradual denial, to students and faculty, of the right to entertain unorthodox views. In the social sciences, objectivity quickly becomes a mirage and eventually even the most academic disciplines are directed toward "the closest possible relationship with the national political needs of *our* people" (Neuman, *supra,* p. 196; emphasis added). The "new" education is based, of course, upon a thorough-going proscription of unorthodox beliefs and a systematic indoctrination that permeates every field of inquiry and instruction. As in other areas of social life, this coordination is largely achieved through the taking of "hostages." The coordination of the German colleges and universities was brought about by the dismissal of probably not more than 15 percent of the academic teaching staff (see: *"The German Universities and the Government"* by E. Y. Hartshorne, *Annals,* American Academy of Political and Social Sciences, November, 1938, pp. 210-234). The key to the success of this new technique of the token purge is to be found in "the effect that this politicization has on the remaining academicians" (Neuman, *supra,* p. 196). In the civil service, as in education, "political reliability" becomes the dominant concept. The Nazis brought about a remarkable "coordination" of the German civil service by the dismissal of not more than 10 percent of the bureaucrats (see: *Yale Law Journal,* Vol. 58, p. 131).

As the enforcement of conformity proceeds it becomes necessary for the censors to create a "system of interlocking fears" (Neuman, *supra,* p. 198). In fact the new

censorship is to be distinguished from all censorships of the past by its use of modern technological innovations to bring about an amazingly effective organization of terror with what appears to be a minimum show of force and violence. Every resource of modern technology is brought to bear upon the problem of annihilating the last vestige of resistance or opposition. As conformity becomes an end in itself—an all-consuming public passion,—distrust is practiced as a matter of official policy. Thus the suspect is guilty before he is arrested; counter-espionage becomes the order of the day; and "loyalty" becomes a major obsession. Ostensibly designed to protect the government against revolutionary overthrow by "force and violence," the new censorship proceeds by force and violence to overthrow the rights of the people.

The Illusion of Acceptance.

Although compelled to use force, the censors are also anxious to create the illusion that their dictates are obeyed out of the cheerful readiness of a seemingly free people. "Every dictatorship," writes Neuman (*supra,* p. 203), "is eager to create the impression of seeming normalcy essential not only to visitors from foreign countries but to its own citizens." For this reason, the new controls proceed by relative indirection; the indirect censorship is preferred to direct control. As pointed out in the *University of Pennsylvania Law Review,* Vol. 96 at p. 399: "The pressure has been toward the development of new devices, untrammelled by such hard-won protective elements (as civil rights), *devices operating indirectly,* imposing new sanctions such as economic deprivation in place of fine and incarceration. The inclination has been to draw within the operation of such techniques those

persons who, because of their position only on the fringes of groups formerly subject to criminal law, could not otherwise be brought under governmental control" (emphasis added). Among the factors which make the use of such indirect techniques feasible is the great extension of propaganda facilities. For example, all modern dictatorships have been quick to use and control motion pictures as part of their propaganda apparatus (see: *The Goebbels Experiment: A Study of the Nazi Propaganda Machine* by Derrick Sington and Arthur Weidenfeld, Yale University Press, 1943, Chapter IX, "The Cinema in the Third Reich," pp. 211-223, where it is pointed out, p. 215, that *control of personnel* was one of the means used to coordinate the industry).

One of the secrets of the success of the new censorship is that it is far more brutal and coercive than it appears to be; most of its dictates, in fact, rest on implied sanctions. Laws are not needed to limit the right of free speech; speech is just as "free" as people feel free to speak. The Commission on Freedom of the Press has given an unequivocal "Yes" in answer to the question,—Is the freedom of the press in danger? Yet no laws have been passed which would challenge the right of a free press. Indeed the new censorship is an aspect of the continued rapid growth of an undemocratic economic structure of power in our society and of the encompassing insecurity which affects every element in the society, the rich as well as the poor. It is this structure of economic power which has tended to rob civil rights of real meaning and significance. "Liberalism," as Dr. John H. Hallowell has reminded us, "was not destroyed by the Nazis . . . rather, the Nazis were the legitimate heirs to a

system that committed suicide" (*The Decline of Liberalism as An Ideology* by Dr. John H. Hallowell, 1946, p. 108). In fact, liberalism has been steadily undermined by the gradual disappearance of individual autonomy and initiative in social and economic life. The new censors, therefore, do not need to imprison armies; a handful of strategically selected hostages, in each group or strata, will suffice for their purposes.

"Pressure" is the key word in the vocabulary of the new censorship. The entire weight of the economic structure can be brought to bear, at any threatened point, in the effort to enforce conformity. For the initial attack, exponents of extreme points of view are usually selected since they can be relied upon to offer open and defiant resistance to the censors. At the outset it is the intransigent, the defiant, witness that the censors elect to degrade and silence, not because this witness is regarded as particularly "dangerous" but because his humiliation will have greater symbolic (*i. e.* propaganda) value than would the humiliation of a less defiant non-conformist. It is not the deeds but the mental attitude of this witness that invests him with importance in the eyes of the censor (see: Bramstedt, *supra,* p. 25). Once the strategic hostages have been selected, every variety of pressure,—coercion, bribery, and persuasion,—is brought to bear to force them to recant. In fact recantation is the real objective of the inquisition. For the new censorship must convert or destroy; it feels menaced by silence. Set in motion at the top, the pressures aimed at securing total conformity are systematically applied throughout every social and occupational strata. The prelude to recantation is the breaking of the will to resist and resistances are

broken by myriad and convergent pressures. The aim of Foché, the dreaded Minister of Police under Napoleon I, as Bramstedt has pointed out, was "not so much the annihilation of the caught bird, but the catching of others. He did not believe so much in violent punishment, but in enforced enlightenment. The prisoner could improve his own position by enlightening the eager police . . . all the worse for him if he failed to realize his own interest" (*supra*, p. 24).

Economic Subjugation.

Economic subjugation is, of course, one of the most effective pressures for conformity in our society. If the recusant witness is a writer, do not bother to burn his books (a book-burning might call attention to the encroachment on civil rights); simply blacklist him with editors and publishers. Make it difficult for him to communicate with his audience and dangerous for his audience to communicate with him. Convey to him by a thousand suggestions, often subtle, always brutal, an awareness of the fact that certain themes are regarded as "subversive." Dangle rich prizes for conformity before his eyes and rely upon enlightened self-interest to police his thoughts. Make it impossible for him to earn a livelihood by his craft if he fails to conform. Destroy his self-confidence. Create such an atmosphere of hostility toward him that even his children will be shunned by the children of conformists. If he is a clergyman, talk to his trustees. If he is a lawyer, pressure his clients to pressure him. Through skillfully directed propaganda, make this recusant witness a social and moral pariah in the community. Label him; smear him; force him to recant; or, indirect pressures failing, destroy him. But, all the

while, be at great pains to deny that any "punishment" is being inflicted or that any ostracism is intended. Campaigns of this character can be organized without the enactment of a single statute infringing civil rights. For the undemocratic structure of economic power is used to provide the unvoiced threat, the unstated sanction, that can convert a "hint" into a command, a suggestion into a threat.

Those on whose behalf this brief is filed have read the record of the hearings out of which this prosecution arose with a feeling of deep shame and outrage. From first to last the record is one that reflects no credit on American institutions or ideals. We refer not merely to the objectives of the committee but to the manner and method, the tone and temper of the hearings. There was no "hearing" in this matter within any rationally defined meaning of the term; what took place was more in the nature of an ideological lynching, a form of psychological warfare conducted on grossly unequal terms. Every effort was made to humiliate appellant, ostensibly a mere witness before the committee; to focus an image of him on the mirror of American public opinion of such calculated distortion as to make him an object of universal hatred and contempt. Indicative of the committee's sense of fairness is the fact that it brought a parade of "friendly" witnesses to the stand and permitted and encouraged these witnesses to defame appellant and his colleagues without giving the latter any opportunity to protect their reputations. No opportunity whatever was offered the appellant to cross-examine these witnesses or to call witnesses in his own behalf or to make a statement. The more violent and abusive the friendly wit-

nesses became, the more the committee beamed its approval. All the facilities of press, radio, and motion pictures were enlisted to make the humiliation of the appellant a nationwide spectacle (see: 14 *University of Chicago Law Review* 256, p. 267).

The proceedings out of which this prosecution arose are poisoned with a bigotry and petty malice that, even in the brief span of time that has elapsed since the hearings, incites utter amazement and incredulity. It is, indeed, hard to believe that it was a committee of the Congress of the United States which conducted this witch-hunt. As Chief Justice Waite pointed out in *Minor v. Happersett* [88 U. S. 162]: "Allegiance and protection are reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." But here a committee of the Congress withdrew the protection of due process from a group of citizens of the United States in the course of an inquiry into their allegiance to the government,——a most unpleasant spectacle to recall, even in retrospect.

The Protection of Ideas.

We are not so much concerned, however, with the lack of due process in the hearings or the personal injustice done appellant, as we are with the threat of censorship implicit in this proceeding, the censorship not only of a most important medium of mass communication but of the thought-processes of every craftsmen connected with motion pictures. Still more are we concerned with this censorship as it constitutes a denial that the American people are capable of self-government. The guarantees of the First Amendment secure a public purpose as well as a private right and the public purpose has nowhere

been more clearly stated than in the Report of the Commission on Freedom of the Press (*A Free and Responsible Press,* University of Chicago, 1947, pp. 6-9):

"Freedom of the press is essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest. It is appropriate that freedom of speech and freedom of the press are contained in the first of those constitutional enactments which are the American Bill of Rights.

Civilized society is a working system of ideas. It lives and changes by the consumption of ideas. Therefore it must make sure that as many as possible of the ideas which its members have are available for its examination. It must guarantee freedom of expression, to the end that all adventitious hindrances to the flow of ideas shall be removed. Moreover, a significant innovation in the realm of ideas is likely to arouse resistance. Valuable ideas may be put forth first in forms that are crude, indefensible, or even dangerous. They need the chance to develop through free criticism as well as the chance to survive on the basis of their ultimate worth. Hence the men who publish ideas require special protection.

* * *

Across the path of the flow of ideas lie the existing centers of social power. The primary protector of freedom of expression against their obstructive influence is government. Government acts by maintaining order and by exercising on behalf of free speech and a free press the elementary sanctions

against the expressions of private interest or resentment: sabotage, blackmail, and corruption.

But any power capable of protecting freedom is also capable of endangering it. Every modern government, liberal or otherwise, has a specific position in the field of ideas; its stability is vulnerable to critics in proportion to their ability and persuasiveness. *A government resting on popular suffrage is no exception to this rule.* It also may be tempted —just because public opinion is a factor in official livelihood—to manage the ideas and images entering public debate.

If freedom of the press is to achieve reality, government must set limits on its capacity to interfere with, regulate, or suppress the voices of the press or to manipulate the data on which public judgment is formed.

Government must set these limits on itself, not merely because freedom of expression is a reflection of important interests of the community but also because it is a moral right. It is a moral right because it has an aspect of duty about it.

It is true that the motives of expression are not all dutiful. They are and should be as multiform as human emotion itself, grave and gay, casual and purposeful, artful and idle. But there is a vein of expression which has the added impulsion of duty, and *that is the expression of thought.* If a man is burdened with an idea, he not only desires to express it; he ought to express it. He owes it to his conscience and the common good. The indispensable function of expressing ideas is one of obligation —to the community and also to something behind the community—let us say to truth. It is the duty of the scientist to his result and of Socrates to

his oracle; *it is the duty of every man to his own belief*. Because of this duty to what is beyond the state, freedom of speech and freedom of the press are moral rights which the state must not infringe.

The moral right of free expression achieves a legal status because the conscience of the citizen is the source of the continued vitality of the state. Wholly apart from the traditional ground for a free press—that it promotes the 'victory of truth over falsehood' in the public area—we see that public discussion is a necessary condition of a free society and that freedom of expression is a necessary condition of adequate public discussion. Public discussion elicits mental power and breadth; it is essential to the building of a mentally robust public; and, without something of the kind, a self-governing society could not operate. The original source of supply for this process is the duty of the individual thinker to his thought; here is the primary ground of his right.

This does not mean that every citizen has a moral or legal right to own a press or be an editor or have access, as of right, to the audience of any given medium of communication. But it does belong to the intention of the freedom of the press *that an idea shall have its chance* even if it is not shared by those who own or operate the press. The press is not free if those who operate it behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to the public attention." (Emphasis added.)

In this country we have never acquiesced in the proposition that persons could be punished for their beliefs any more than we have approved the theory that beliefs *per se*

can be banished from men's minds by fear or compulsion. Belief is a domain that lies beyond speech and statement. Freedom of speech and of press are indispensable aspects of self-government; but freedom of belief rests on our concept of the moral freedom of the person. We have always insisted that the person must be regarded as morally free since only by this insistence are we justified in drawing the inference of responsibility upon which the theory of self-government rests. Under our system of government, therefore, we do not reject a policy by arresting the persons who have proposed it. "The essence of our political theory," writes Mr. E. B. White (New York *Herald-Tribune,* December 2nd, 1947), "in this country is that a man's conscience shall be a private, not a public affair, and that only his deeds and words shall be open to survey, to censure and to punishment. The idea is a decent one, and it works. It is an idea that cannot safely be compromised with, lest it be utterly destroyed. It cannot be modified even under circumstances where, for security reasons, the temptation to modify it is great . . . One need only watch totalitarians at work to see that once men gain power over other men's minds, that power is never used sparingly and wisely, but lavishly and brutally and with unspeakable results. If I must declare today that I am not a Communist, tomorrow I shall have to testify that I am not a Unitarian. And the day after that I have never belonged to a dahlia club. It is not a crime to believe anything at all in America."

The American tradition, in this respect, merely follows the established maxim of the law which runs *Cogitationis poenam nemo meretur* ("No one deserves punishment for his thought"). In one form or another this maxim occurs in all the standard collections of maxims, including the one of Broom (10th ed. by Kersley, 1939). It is cited as an authoritative statement of law in our courts. *Cf McDermott v. Pyle,* 5 Parke Cr. (N. Y.) 102; which again is cited for this maxim in *State v. Taylor,* 47 Ore. 455, 8 Ann. Cases 627; 4 L. R. A. N. S. 417.

The maxim is derived from the Corpus Juris of Justinian. It appears in the *Digest,* Book 48, Title 19, Sec. 18, and is there quoted from the great jurist, Ulpian, who died in 228 A. D. It was regarded as sufficiently important so that, brief as it is, it forms a section of the title by itself. It was repeated in the Byzantine revision of the Corpus Juris, the Basilica (b. 60, 17), put together in the ninth century. The Glossators of the thirteenth century note it particularly and cite other illustrations. It is a well-known fact that these Glossators exercised a considerable influence on the founders of the common law, especially on Bracton.

Even in the common law of treason, where it has been frequently declared that there is an exception to this principle, because under the Statute of Treason of 1350 (25 Edw. 3, st. 5, c. 2) "imagining" or "compassing" the death of the King was included, it has been pointed out that the statute itself—which in part has been taken over into the Constitution of the United States—demands quite

explicitly an *overt* act as proof of the "imagining" and "compassing." And in the revival of the statute in the first year of Mary (1553) there is an express denunciation, in the preamble, of those who punish people for *words alone* "without fact or deed." The notion that thoughts could be punished, without even words, would have been abhorrent even during the quasi-absolutism of the Tudors. *Cf.* Kenny, C. S. *Outlines of Criminal Law,* 15th ed. (1936) 41-42.

The maxim *cogitationis poenam nemo meretur* was widely quoted by civilians and canonists. Every now and then it was uneasily explained away by some jurists in their eagnerness to carry out the arbitrary decrees of their masters. But the great majority pointed out that these "interpretations" were perversions. The maxim was not a casual assertion; on the contrary, it was placed in a deliberately conspicuous position in the Digest title called, "On Punishment," which dealt with the theory and practice of punishment under the law. It is worthy of note that in a dictionary of canon and civil law of 1759, edited by Bynkershoek, the maxim is quoted with the concluding words *coram terreno tribunali,* "before an earthly tribunal." The suggestion is made, therefore, that before a heavenly tribunal thoughts might be punishable. Whether or not the Committee on Un-American Activities of the House of Representatives feels that it can claim a standing higher than that of an earthly tribunal we need not conjecture but we may assume that this Court makes no such pretension.

Conclusion.

Concerned as we are with the social implications of the issues in this case, we most respectfully urge the court to decide these issues upon the basis of broad principle and in a manner that will provide a real guide to American policy. A reversal of the petitioner's conviction will not necessarily settle the issue discussed in this brief but a reversal based upon the guarantees of the First Amendment would go far toward arresting the trend toward censorship of thought and opinion of which this case is a most significant manifestation. In the last three decades, this court has vindicated and upheld the guarantees of the First Amendment in a manner and with a courage that is quite beyond praise. Now the court is being asked, in this case, to vindicate these same guarantees against encroachment by the federal Congress in an abuse of the important power of investigation. We can appreciate the seriousness of the issue which is thus presented to the court but we are convinced that the mere fact that the transgressor in this instance happens to be a committee of the Congress will not blunt the force of the precedent with which this court has upheld the American Bill of Rights.

MAX RADIN,

Counsel.

CAREY MCWILLIAMS,

Of Counsel.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 248

JOHN HOWARD LAWSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 249

DALTON TRUMBO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

MOTION AND BRIEF ON BEHALF OF AMERICAN WRITERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT'S POSITION THAT A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, BE DENIED

AMERICAN WRITERS ASSOCIATION, INC.,
Amicus Curiae.

LOUIS WALDMAN,
Of the New York Bar,
Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Now comes the American Writers Association, Inc., by its attorney, and respectfully moves for leave to file the attached Brief as *Amicus Curiae* in the above-entitled cause in support of the Respondent's position that a Writ of Certiorari should be denied. As grounds for said motion movant shows:

1. The American Writers Association, Inc. is a membership corporation, organized under the laws of the State of New York, consisting of several hundred writers.

2. Among the purposes of the American Writers Association, Inc. are:

(a) to protect American writers from the Communist totalitarian threat to their freedom and the freedom of American culture generally created by the deep inroads which Communists and Communist front organizations have made in the fields of moving pictures, radio, theatre, and publishing.

(b) to protect and preserve the principles of human freedom and the Bill of Rights from the Communist totalitarian threat created by the world-wide attempts of Communism to subvert all freedom.

3. The interest of the American Writers Association, Inc. in opposing the petition for Certiorari is this:

The petitioners herein are writers, claiming for themselves immunity from investigation by the House Committee on Un-American Activities. The American Writers Association, Inc. believes that writers above all, precisely because they play such a vital role in molding American thought and life, owe a special duty of candor and openness to the community as to whether or not they are Communists.

4. We are informed that the petitioners herein have petitioned this court that Writs of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit and that the United States of America by the Solici-

tor General is opposing the said petitions. The movant, the American Writers Association, Inc., is desirous to support the position of the Government herein.

5. The Solicitor General, as counsel for the Government, has given his consent to the filing of this Brief. Counsel for the petitioners herein has also given his consent.

6. Special reasons in support of this motion are set out in the accompanying Brief.

Respectfully submitted,

LOUIS WALDMAN,
Counsel for
American Writers Association, Inc.

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POINT I

The threat to our country and to our form of government from adherents of Communism is a proper subject of Congressional inquiry.

We believe that the following five facts have been amply established by the history of the past thirty years, and that

we are justified in asking this Court to take judicial notice of them.

1. Communism is an international movement, and the Communist Party of the United States is a section of that movement.

2. Unlike other international movements, the Communist movement is committed to a program by which it seeks to subvert all existing non-Communist forms of government, even the most advanced democracies, including our own.

3. It seeks to carry out its subversive program by peaceful means where possible, and by force and violence where it deems it to be necessary.

4. In non-Communist countries, Communist Parties have served as fifth-columns for Soviet Russia, and in some countries have already aided and been aided by the Red Army.

5. The Communist movement carries on some of its activities in the open, and many of its activities underground, using concealment as one of its techniques.

So much is common knowledge. The existence of this movement, we hold, constitutes a threat to our country, to our free institutions and to our form of government. But the concrete expressions of that threat, in the United States, its extent and specific form, and the human agencies involved, can be best ascertained by a Congressional inquiry, and Congress not only has the power, but it is its duty to do so.

In the thirty-two years since the Bolsheviks first seized power in Russia, the nature of the Communist movement has become well known throughout the world. Merely by way of example, and to illustrate, we cite two recent manifestations.

The first came when Jacques Duclos, an important figure in world Communism and the head of the Communist Party in France, denounced the policies of the American Communist Party and of Mr. Earl Browder, its General Secretary, its many-times candidate for President of the United States, and its actual head, and this denunciation was followed within a short time by the removal of Mr. Browder, his expulsion from the Communist Party and a complete change in party policies.[1]

The second manifestation came more recently when the leaders of the Communist Parties of Europe one after another publicly declared that a war against Soviet Russia would be by definition an imperialist war and that the Communist Parties of these countries would not support their countries in an imperialist war. Shortly after these statements of policy had been made by the European Communist Parties, the Communist Party in the United States made a similar statement of policy.[2]

We shall refer again to these declarations which amount in effect to notice that Communists will fight against their native countries—and that includes Communists in the United States—in another part of this Brief. Here it is

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[1] N. Y. Times, May 25, 1949, p. 1.
[2] Daily Worker, Mar. 3, 1949; N. Y. Times, May 3, 1949, p. 1.

enough to point out that there could be no clearer proof of the international character of the Communist Party in the United States.

Does the existence of such a group in the United States, present a threat to our form of government? We believe that it does, but the point we wish to emphasize here is that the inquiry, the question by the Congress, is a natural and proper one, whatever the answer may be.

The inquiry launched by Congress, through its Committee, must be evaluated against the entire background of the Communist movement.

This inquiry by the Congress as to subversive Communist activities at home cannot be viewed by this court as an isolated event. It is but one of the ways in which our country, recognizing the threat of Communism, is reacting to it.

The end of World War II brought with it an immediate threat of Communist domination of many countries of Europe, accompanied by a direct challenge to our national vital interest, and a threat to our own security. That threat came not from independent Communist parties in the respective countries, but had as its fountain head and as its prime force the government of Soviet Russia. The threat was considered by our government and our people to be sufficiently serious and sufficiently immediate to lead us to spend billions of dollars through the European Cooperation Administration to meet this threat and to prevent the spread of Communism to the shores of the Atlantic. Meanwhile and prior to the authorizations of these huge expendi-

tures, our government had authorized large expenditures of money in Greece in order to prevent the overthrow of the duly constituted government there through a cold war in which the Communists of Greece were aided by foreign Communist forces. We even sent arms and military personnel to aid the Government of Greece.

Beginning shortly after the end of World War II, up to this date, our country has been engaged in what is popularly known as a "cold war" of which the Berlin crisis was only one aspect. Its effect on our country has been so deeply felt and so greatly feared, that the United States has committed itself to far reaching and unprecedented policies such as the recently ratified Atlantic Pact, a military alliance between the United States and the democratic countries of Western Europe.

It is the facts of our current experience which provide the context in which inquiry is made by a duly constituted committee of Congress into the threat to our form of government by adherents to that form of government and to that power against which we are now defending ourselves in a cold war.

Congress in such a context, has every right to inquire into the nature and degree of the threat to our form of government which is caused by the existence and activities of the Communist Party in our country.

POINT II

The standards set up in the statute creating the Committee are clear and definite.

The Committee on Un-American Activities was duly authorized under the Legislative Re-organization Act of 1946 to conduct investigations of:

> "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (60 Stat., 812, 828).

The provisions of this statute were incorporated in the rules of the House of Representatives of the Eightieth Congress by House Resolution 5, January 3, 1947.

The claim has been made that this language is so vague as not to constitute the basis for a criminal indictment for contempt of the Congress in refusing to answer pertinent questions by the Committee thus established. We submit that "the diffusion within the United States of subversive . . . propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," is a clear and precise statement of the objects of the investigation and sets up clear and precise standards of investi-

gation to which the committee must adhere. A great deal of ink has been spilled in attempting to prove that the word, "un-American" is vague as a standard. Such argument, we submit, is beside the point in view of the language we have just quoted. There is nothing unclear or vague about subversive propaganda. There is nothing unclear or vague about the phrase "instigated from foreign countries," nor about "the principle of the form of government as guaranteed by our Constitution." The specific questions put by the Committee to Mr. John Howard Lawson and to Mr. Dalton Trumbo, clearly fall within one or both of these specific standards—and the petitioners have no basis for complaint.

POINT III

The power to investigate the threat to our form of government from Communism, carries with it the power to inquire into the identity and the number of those who adhere to the vehicle through which that threat is expressed and given form.

In the context of our times, in the midst of a cold war, Congress certainly has the power to inquire into the threat of Communism to our form of government. This inquiry logically falls into several subdivisions of which at least two are pertinent here. First, comes the inquiry, does Communism constitute a threat to our form of government? Second, if the answer be in the affirmative, even tentatively, in the minds of the members of the Committee, then the extent of the threat becomes a proper subject of inquiry. Since the threat if it does exist does not exist in a vacuum,

the human agencies of the threat are proper subjects for inquiry.

Let us first consider the first aspect of the inquiry, which is the question: Does Communism constitute a threat to our form of government? In pursuing such an inquiry with legislation as its aim, surely the inquiry should be made not merely from the opponents of Communism, but from its adherents as well. Congress is under a duty as a matter of fair play, at the very least, to elicit from the adherents of Communism their answer to the question whether Communism is a threat to our form of government. It necessarily follows that Congress is under a duty to determine who are the adherents of Communism so that it may pursue this line of inquiry further.

Thus the question: "Are you or have you ever been a member of the Communist Party?" is basic to an inquiry into the existence and extent of a threat to our nation from Communism, and the answer to that question from Communists themselves, is an essential part of the information sought. It is thus relevant to the subject of inquiry and to refuse to answer is to refuse to give to the Congress information which it must have to reach a proper and informed judgment on the matter under investigation.

But the right of the Congress to ask if a person is or ever has been a member of the Communist Party, does not depend upon this first phase of the investigation alone, for the extent of the threat is as much a subject of legitimate questioning as the existence of the threat. Here we refer again to the recent history of Europe and Asia. This court

may take judicial notice of the fact that first one country and then another in Eastern and Central Europe was subverted to Communism not by democratic process, not by the will of a majority, but by the calculated revolutionary overturn of constituted government by a minority.

Shall it be said that we are in no danger because only monarchies—like Greece—are subject to violent guerilla action by minorities? But China, which has fallen in large measure to the Communists, was a republic. Shall it be said that China was not really a democracy, and that accounts for its fall? But the last of the governments of Europe to be overturned by a minority was Czecho-Slovakia, a bastion of democracy in Europe, a model of democracy for many years. Czecho-Slovakia, like the other Central European countries where Communist seizure of power has been successful, is behind an iron curtain, but the whole world knows and this court may take judicial notice of the fact that Czecho-Slovakia, like the other Central European countries, was overturned by a Communist *minority.*

How small the minority was we do not know in figures, but the whole world knows that it was small and that it made up in discipline, in fanaticism and in the backing of a great world power for its lack of numbers.

From the day in 1917 when the democratically constituted government of Russia, represented by the constituent assembly, was overthrown by a handful of Communists, to the day three decades later when the democratically constituted government of Czecho-Slovakia was overthrown by a minority of Communists, a record has been written, of

which this court should take judicial notice, of a definite, effective technique of seizing power by Communist minorities.

In the light of this history, we submit that the Congress has the right to inquire and to seek to determine how many adherents of Communism there are in this country and that the question "Are you or have you ever been a member of the Communist Party?" is a question which is asked in pursuance of that right, and that Congress has the right to ascertain from Communists as well as non-Communists, all that it can of the techniques used by Communists in this country.

POINT IV

The question "Are you or have you ever been a member of the Communist Party?" is not an inquiry merely into beliefs, but an inquiry into activity.

The question, "Are you or have you ever been a member of the Communist Party?" has been attacked as being an invasion of the rights of a witness in that it is an inquiry into the opinion of the witness and the contention has been advanced that such an inquiry into opinion is a violation of the First Amendment to the Constitution.

We submit that such a contention completely misapprehends the nature of the question "Are you or have you ever been a member of the Communist Party?" Unquestionably membership in the Communist Party carries with it a belief in Communism, but that is not all. The Communist Party in the United States is not a mere propa-

ganda organization, nor for that matter is it a mere political party.

This much is definitely known and the Court may take judicial notice, that the Communist Party has a broad and variegated program of domestic activities involving trade unions, the military establishment, schools and universities, government, and fraternal, religious and cultural organizations. This alone shows conclusively that membership in the Communist Party means more than the mere espousal of certain views, it involves activity along communist lines.

Furthermore, many informed people believe that the Communist Party carries on organizational activities within trade unions which give it a grip on vital sectors of our economic life; that it carries on espionage; that it encourages the formation of Communist-front bodies in educational institutions; that it seeks to penetrate such organizations, for example, as the Screen Writers Guild, for the purpose of furthering its ends. Moreover, as we have already shown, it takes a position in advance with respect to the participation of its adherents on a possible future conflict between the United States and Soviet Russia.

That such acts may be accompanied by speech or by writing, which, standing by themselves, may enjoy certain immunities, does not mean that the acts joined with speech enjoy the same immunities.

As this court has said in *Gibboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490, 502 (1949):

> "But it has never been deemed an abridgement of freedom of speech or press to make a course of

> conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. See *e.g., Fox* v. *Washington,* 236 U. S. 273, 277; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568."

The Congress has the right, therefore, to determine who is committed to the Communist program, and the acts involved in it, whether or not they are mingled with speech.

Moreover, we respectfully submit that, even if we assume (we do not concede), that the question asked of the petitioners is an inquiry into opinion, if it be held that such an inquiry comes within the ambit of the protection accorded to free speech by the First Amendment, then it likewise comes within the limitations on free speech which have been delineated by our courts. Just as the right to free speech is not absolute, so the right, if any there be, to silence as to one's opinion, by the same token cannot be absolute. As the court stated in *National Maritime Union of America, et al.* v. *Herzog, et al.,* 78 F. Supp. 146, 165 (1948), affirmed, 334 U. S. 854, 68 Sup. Ct. 1529, 92 L. Ed. 1776 (1948):

> "It is fully established by reiterated holdings of the Supreme Court that the right of free speech is not absolute but must yield to national interests justifiably thought to be of large importance. The same is true of the right to remain silent. When legislating to avert what it believes to be a threat of substantive evil to national welfare, Congress may abridge either freedom. The right to be silent may be interfered with in either of two ways: As an incident to the accomplishment of a legislative purpose, Congress may require an individual to make

> a statement specifically prescribed by it; or it may require generally that an individual make any statement essential to avert the anticipated evil, without defining the statement."

Nor does the clear and present danger doctrine enunciated by the Supreme Court in *Schenck* v. *United States,* 249 U. S. 47 (1918), constitute a limitation on the committee here, for the clear and present danger doctrine applies only to cases where a statute has actually imposed a restriction on speech or publication. *Barsky, et al.* v. *United States,* 167 F. 2d 241 (App. D. C. 1948); certiorari denied, 334 U. S. 843 (1948), petition for rehearing currently pending.

But because the clear and present danger doctrine is applicable to legislation enacted involving speech, here, where Congress' inquiry is conducted to determine whether legislation which may affect speech, is needed, the clear and present danger doctrine becomes a compelling reason for sustaining the right of the Committee to inquire as to whether one is or has been a member of the Communist Party.

Should the Committee decide to recommend legislation involving speech, the Congress will need to know whether a clear and present danger, in fact, exists.

It would seem obvious, therefore, that the Congress in its inquiry into subversive activity, would be under a duty to secure information during its investigations concerning both the clearness and the immediacy of the danger to be apprehended. In the pursuit of such an inquiry, the question "are you or have you ever been a member of the

Communist Party?'' is justified in itself, and is an essential preliminary to eliciting from a witness information bearing on the question of whether the subversive activities being investigated constitute a clear and present danger.

POINT V

Since the question under investigation is a proper subject of inquiry by Congress and since the Committee is validly constituted and the statute creating it contains clear and proper standards, any abuse of its powers by the Committee, so long as such abuse does not result in an invasion of a witness' rights, is a matter for correction by Congress and the People and not by the Courts.

The right of Congress to investigate is so well established that we have cited no authority therefor in this Brief. The investigation by the House Committee on un-American Activities in this case has been carried on by a Committee of Congress which was validly constituted, under clear and proper standards, and the question put to the petitioners herein was lawfully asked, and was relevant and material. One other contention, however, has been consistently pressed in the courts below in this and related cases such as the *Barsky* case, *supra,* and in *United States* v. *Josephson,* 165 F. 2d 82 (C. C. A., 2, 1948); certiorari denied, 333 U. S. 838 (1948), and undoubtedly will be advanced here, and that is the contention that the Committee has openly avowed, through statements by various of its members, that one of the objects of the investigation is *exposure* of Communist and Communist Front personnel and activi-

ties. It is argued that exposure is not one of the duties the Committee is charged with by the statute creating it on the one hand, and it is further argued on the other hand, that if the statute did impose upon the Committee the duty of exposure, it would be unconstitutional. The argument is carried even further and the claim is made that in fact Congress has not, throughout the years of the Committee's existence, passed any legislation as a result of the Committee's investigations.

Let us first dispose of this last argument. The short answer is to be found in the language of the court in the *Barsky* case, *supra,* on page 245, where the Court says:

> "The fact is that at least eight legislative proposals have been submitted to the Congress by this Committee as a result of its investigations."

But in our view, the Committee has a right and a duty to inform public opinion as well as Congress by exposure. "Exposure" is not another word for informing the Congress and the public of the existence of a fact—in this case the fact of subversion. If Congress has the right to have this information, so has the public. The legislative process does not begin or end with the report of a Congressional Committee to the Congress. Legislation generally, and controversial legislation especially, requires an informed public opinion as well as an informed Congress. Indeed an informed public opinion is at the very basis of the legislative process at its best. Therefore, we believe that the Committee as an incident to its powers and functions does have the right to inform the public of the facts that it learns in the course of its inquiry.

But even if it be deemed that this Committee does not have the power of exposure, and that the Committee has spent an undue proportion of its time in exposure rather than in investigation for the purpose of gathering facts on which to base legislation, this would not constitute a basis for denying to the Committee the right to put to the appellants the questions which are at issue here.

For the ultimate test is the statute creating the Committee.

So long as the questions put by the Committee were justified by its investigative and legislative functions—and they were—any abuse of the Committee's powers elsewhere (a charge we do not concede) would not affect the power of the Committee to put the questions at issue here. By the same token, any abuse of its powers by the Committee, so long as it does not trench on the rights of the petitioners, cannot be asserted by them as a basis for contending that the Committee's questions were illegal. And in any event, as we read the petitioner's contentions, the alleged abuses by the Committee are not properly before this Court, and such abuses, if they did exist, are not subject to correction by the Courts, but by Congress itself. The Committee is an arm of one of the three departments of the government whose powers are co-equal with those of the executive and the judiciary and may be invaded by neither. If there be abuses, and if Congress should fail to correct them, the remedy lies not with the Courts, but with the people and its power to change the composition of the Congress.

CONCLUSION

For all of these reasons we respectfully submit that the petitioners' petition for writs of certiorari should be denied.

Respectfully submitted,

AMERICAN WRITERS ASSOCIATION, INC.,
Amicus Curiae.

LOUIS WALDMAN,
Counsel.

CERTIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Before me, the undersigned authority for said County in said State, personally appeared MARY HOFFERT who, being by me first duly sworn stated on oath that on this 12th day of September, 1949, she deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Philip B. Perlman, Solicitor General, Department of Justice, Washington 25, D. C., counsel for the Respondent, and to Robert W. Kenny, Esq., 629 South Hill, Los Angeles, California, attorney for the Petitioners.

MARY HOFFERT
Mary Hoffert

Sworn to and subscribed before me
this 12th day of September, 1949.
Martin Markson
MARTIN MARKSON
Notary Public, State of New York
Qualified in Queens County
Queens County Clk's No. 4575
New York County Clk's No. 1544
Commission Expires March 30, 1950

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

JOHN HOWARD LAWSON, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No. 248
DALTON TRUMBO, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No. 249

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Motion of the National Union of Marine Cooks and Stewards for leave to file brief as *amicus curiae* in the above-entitled proceedings respectfully shows as follows:

(1) National Union of Marine Cooks and Stewards is a voluntary, unincorporated association and labor organization with its principal place of business situated in the City and County of San Francisco, State of California.

(2) It seeks to file a brief as *amicus curiae* in the above proceedings because it feels very strongly that the decisions of the Courts below are such a gross violation of constitutional rights of the petitioners as to imperil the civil liberties of all the people of the United States and are a direct threat to the continued free existence of applicant, an organization whose effectiveness in defending the rights of workers depends on untrammeled freedom of opinion, belief and association. These cases present a challenge which applicant feels it cannot ignore.

WHEREFORE, applicant prays leave to file a brief as *amicus curiae* in the above proceedings in support of petitioners therein.

Dated, San Francisco, California,
September 7, 1949.

HAROLD M. SAWYER,
Attorney for National Union of Marine Cooks and Stewards as Amicus Curiae.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

JOHN HOWARD LAWSON, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No. 248
DALTON TRUMBO, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No. 249

THE BRIEF OF NATIONAL UNION OF MARINE COOKS AND STEWARDS AS AMICUS CURIAE.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

WHO THE AMICUS CURIAE IS.

This brief is submitted by the National Union of Marine Cooks and Stewards, a labor union which

under its present and former name has been in existence 48 years. Its membership is composed of 6000 marine cooks and stewards who man the stewards' department on freight and passenger vessels sailing from the west coast in both offshore and coastwise service. The union is affiliated with the Congress of Industrial Organizations.

The purpose of the organization is in general the amelioration along political, economic and social lines of the lives of its membership. Forty-five percent of its members belong to the Negro and other minority races.

The Union is an American patriotic organization and as such is essential to the perpetuation of a self-governing democracy in the United States.

WHY THE BRIEF IS SUBMITTED.

The union regards the instant cases as glaring examples of a nationwide effort of the great industrial and financial monopolists of this country to strike down the Bill of Rights and render the great mass of the people powerless to resist or protest the destruction of their democratic rights and liberties. The ultimate purpose of this conspiracy is to control the economy of the United States in the interests of a few at the expense of the many, to swell profits and to beat down wages. However, this objective cannot be reached unless all protest has been effectually silenced.

These cases are considered by the union as part of a well-defined plan to suppress all protest and in this

plan puppet legislators, venal executives and some complaisant courts all play their parts. The immedidate objective of the conspiracy is to indentify as Communist or Communistic any person or organization who or which dares to assert independence in thought. Any criticism of this policy or its execution is to be branded as Communist or subversive and the word "Communist" is to be given such a repugnant connotation that all criticism shall be effectually stifled lest the critic be named a Communist. Communism therefore becomes a label which can be sewed on any progressive or liberal person or movement in the confident expectation that social or economic ostracism will be punishment for daring to differ with or oppose the real traitors to America who are part of the conspiracy to stifle protest by intimidation.

Because the trade union movement is the strongest bulwark of Democracy and because this conspiracy has for its primary objective the weakening and eventual destruction of all labor organizations and because these cases unless reversed will become a potent weapon for the accomplishment of the conspiracy, the union is impelled to file this brief.

THE IMPACT OF THE CURRENT DRIVE ON LABOR UNIONS.

It cannot be denied that since the death of Roosevelt there has been a nationwide attack upon all forms of labor organization. This finds expression in restrictive legislation in the several states and notably in the enactment by Congress of the Taft-Hartley Act.

Every effort is being made to deprive unions of militant leaders and ultimately destroy labor organization completely, thus enabling monopoly interests to eliminate collective bargaining, set wages and working conditions at will with lower wages, speed-up and general depression of the living standards of labor.

THE LIBERTIES OF ALL THE PEOPLE ARE IMPERILED BY THE DECISIONS OF THE COURTS BELOW.

We shall not attempt to comment on the many prejudicial errors disclosed by the record in the instant cases, but shall limit the discussion to the civil liberties issues involved.

When the Constitution of the United States was presented to the people by the Constitutional Convention it contained no Bill of Rights. Many of the delegates were as fearful of democracy then as the Parnell Thomases, Mundts and Nixons now are. It took a determined fight by an aroused and suspicious electorate to compel the adoption of the first ten Amendments to the Constitution as the price of ratification.

If the instant cases are not reversed and the indictments dismissed, these ten Amendments will become a dead letter and the purposes of the reactionaries of the Constitutional Convention will finally have been accomplished.

During the many decades that have elapsed since the Constitutional Convention adjourned, there has

been an incessant struggle by reactionary elements to whittle down and emasculate the Bill of Rights. The battle has been fought largely in the area of the First Amendment, which is the great cornerstone of all liberties in the United States. Freedom of religion, of thought and opinion, freedom of the press, the right of free association and assemblage, these are the constitutional liberties, the civil rights which are denied by the decisions of the courts below.

The new technique of the Congressional Committee, established with the approval of the courts below, threatens the right of the people of the United States to think for themselves and establishes governmental thought control—the very thing the founders of our country fled from in England and elsewhere when they came to America.

From the standpoint of the union, a most dangerous precedent has been created by the courts below. All that is necessary is to subpoena a militant trade unionist, for example the leader of a strike for better wages and working conditions before any legislative committee, develop perhaps his resentment over strike-breaking by governmental activity, perhaps his opposition to the Marshall Plan or the North Atlantic Pact, characterize these ideas as subversive and you have immediately branded him as a traitor and the strike as treason. Such a technique spells the ultimate destruction of the trade union movement. And because this union and its officers have been and are the victims of political persecution such as has been

visited upon the petitioners herein, the union feels that unless the decisions of the courts below are reversed its very existence is in jeopardy.

Just as Hitler found it necessary utterly to destroy all forms of liberal organization in Germany before he could enslave the German people and bind them to his will, so the monopolists in America realize that they cannot carry out their plans for untrammeled control of the economy of the United States and of the people until they have first destroyed the trade unions.

The trade unions have ever been in the forefront of the battle for the preservation and extension of democracy and with their destruction the democratic rights and liberties of all the people will be at an end.

Once freedom of thought and association are invaded, there is no end to the process. Today, Communists are the target not because any sane person in the United States really thinks that the Communists can, or think they can, or even seek to overthrow the Government by force or violence, but because once all protest and criticism, all striving for a better and more abundant life can be characterized as subversive, protest is silenced by the fear of consequences.

But tomorrow it may be that protest may come from some other source, as it has in times past, from church groups, from women's organizations, youth groups and the like, and just as the civil liberties of

any group or individual have been violated, the civil liberties of all are jeopardized.

THE PETITIONERS HAVE BEEN PERSECUTED NOT FOR CONDUCT BUT FOR THEIR THOUGHTS AND OPINIONS.

John Howard Lawson and Dalton Trumbo have committed no crime and yet they have already been punished more severely than most criminals. Because they resolutely and courageously insisted on their constitutional right to be let alone, they have been blacklisted in a tightly knit industry and deprived of their power to earn a living, and unless these cases are reversed, will be sent to prison—and all because they dared to challenge the right of a rump congressional committee to question their economic, social and political beliefs and opinions. This is the precise area, the area of opinion and belief, that is protected by the First Amendment.

As Mr. Justice Jackson, speaking for this Court said in *W. Va. State Board of Education v. Barnette* (309 U.S. 624 at 642) "No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." Yet notwithstanding this prohibition of the highest Court in the land, the members of the sub-committee in congress dared to force Lawson and Trumbo to confess their faith or lose their livelihood and run the risk of imprisonment. This new technique of the

committee, supported by the decisions of the Courts below, gives new life to the hated blacklist against which this union and every other labor organization worthy of the name has waged a determined fight for many years.

CONCLUSION.

The union endorses every word in the Petitions for Certiorari filed herein by John Howard Lawson and Dalton Trumbo, but because of the peculiar and special impact of the decisions of the Court below upon its members and officers in their day to day struggles for better conditions for all the people of the United States, it has deemed it a matter of vital importance to advise this Court of the disastrous effects of the decisions of the Courts below upon the very life of the union.

Trade unions do not represent a selfish class interest and they have always been in the forefront of the historic struggle to defend the civil rights and democratic institutions of all the people. They are important socially, economically and politically and their wage constitutes the mass buying power that supports the whole economy of the United States. They are entitled to be heard not only on their own behalf but on behalf of all the people of the United States.

This union, therefore, earnestly urges the Court to grant the Petitions for Certiorari herein, to take jurisdiction of the case and to reverse the decisions

of the Courts below and dismiss the indictment of the petitioners.

Dated, San Francisco, California,
September 7, 1949.

Respectfully submitted,
HAROLD M. SAWYER,
Attorney for National Union of Marine Cooks and Stewards as Amicus Curiae.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Of Counsel.

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CHARLES ELMORE

United States Supreme Court

OCTOBER TERM, 1949

JOHN HOWARD LAWSON,
Petitioner,
against
UNITED STATES OF AMERICA.

No. 248.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE, AS *AMICI CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS,
Counsel.

OSMOND K. FRAENKEL,
EMANUEL GORDON,
HERBERT M. LEVY,
of the New York Bar,
of Counsel.

UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE,
Amicus Curiae.

United States Supreme Court

OCTOBER TERM, 1949

JOHN HOWARD LAWSON, *Petitioner,* *against* UNITED STATES OF AMERICA.	No. 248.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE, AS *AMICI CURIAE*

The Interest of the American Civil Liberties Union

The American Civil Liberties Union is an organization devoted to the protection and expansion of the guarantees contained in the Bill of Rights. Because this proceeding is alleged to involve a member of the Communist Party, we believe that it is pertinent to state our views and those of the Unitarian Fellowship for Social Justice. The American Civil Liberties Union as a champion of civil liberties is opposed to any governmental or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or to any single party state and any movement in support of them, whether fascist, Communist, or known

by any other name. In opposing these dictatorial or totalitarian systems, the Union takes no position on their economic, social, or political practices or policies not affecting civil liberties.

From the inception of the House Committee on Un-American Activities, the American Civil Liberties Union has consistently opposed it both because its very existence in our view constitutes a threat to freedom of expression and association by the nature of its mandate, and also because its procedure has been so arbitrary and guided largely by personal whim and political prejudice.

We respectfully urge that this court grant certiorari to review the decision below so that it may decide a novel question whose importance it has already recognized. Certainly the issue of whether the exercise of the powers said to have been conferred upon the Committee is consistent with the Constitution is important. Last year, by its grant of certiorari in the *Eisler* case, the Supreme Court recognized this importance by agreeing to review that decision. See *Eisler* v. *United States*, 93 L. Ed. 1326, 1330 (Mr. Justice Murphy, dissenting). Since then, the continued burdens and restraints upon freedom of expression and free circulation of ideas by the forced confession methods of the House Committee have rendered the decision of this issue even more imperative.

We submit that the First Amendment prohibits Congress from compelling revelations of opinions whose expression it may not restrain, that there is a freedom to be silent as well as to speak, that the resolutions setting up the Committee provide improper standards in that the terms of reference are too vague and that they authorize investigations of matters beyond the powers of Congress to investigate.

We earnestly request, therefore, that this petition for a writ of certiorari be granted, not on any narrow grounds, but to review the overwhelmingly important issue of whether Congress may constitutionally create a committee, whose operation, in accordance with its avowed purpose, has resulted in the restriction of that freedom of expression and thought upon which the vitality of our American democracy is built.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS,
Counsel.

OSMOND K. FRAENKEL,
EMANUEL GORDON,
HERBERT M. LEVY,
of the New York Bar,
of Counsel.

UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE,
Amicus Curiae.

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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 248.

JOHN HOWARD LAWSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE SAMUEL ADAMS SCHOOL FOR SOCIAL STUDIES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Samuel Adams School for Social Studies was formally organized in August, 1944, following some exploratory effort during the preceding year which demonstrated the need for an interest in courses designed primarily for adult employed persons. A Board of Trustees, numbering among its sixteen members educators, publishers, ordained ministers, professors and labor leaders, all local residents and active in civic affairs, and of diverse social, political and religious views, continued with only a few resignations, due to change of residence or pressure of other obligations, to direct the affairs of the school throughout the

period of its existence. Established teachers from local institutions, including Harvard University, Massachusetts Institute of Technology, Tufts College, Boston University, Wellesley College, Simmons College and schools of art or music, spontaneously volunteered to conduct courses because of their personal interest in the purposes and objectives of the school. In many instances they did this without compensation.

The purpose of the school was twofold: to offer to adults courses dealing with the areas of conflict and misunderstanding in international relations and with tensions on the domestic scene based on economic, religious, racial or cultural differences; and secondly, to offer courses of personal advantage in understanding oneself and others, rearing children, maintaining wholesome family and community relationships, and in the enrichment of life through the cultivation of taste in art, music and literature. Appropriate courses in crafts, music, dramatization and art were also offered for workers' children on Saturday mornings. Of the 375 courses offered during the existence of the school, 53% dealt with the world today, history, economics, labor and trade union problems; 36% with psychology, philosophy, science, literature and the arts; and 11% were devoted to the needs of growing children. The school reached 4388 registrants in its various courses.

The school also provided a forum for the open discussion and consideration of current issues and problems by distinguished visiting authorities, authors, creative artists and social scientists and also provided a wholesome atmosphere and setting for the recreational needs of the younger group through informal gatherings, dances, teas, and dramatics or musical programs.

Courses were announced by successive issues of a catalogue which described the course, named the instructor and made public every pertinent fact regarding the school.

The school was open to visitors, and all functions came readily under public scrutiny. No charge of impropriety was ever lodged. In fact, expressions of commendation, approval and praise gave continuous encouragement to the Board of Trustees.

By means of and for reasons of which the Board was never apprised, the school was included in the list of "subversive" institutions and organizations issued by the Attorney General of the United States. Shortly after the publication of this list, the school was advised by the Treasury Department of the United States of the revocation of the school's tax-exemption status, which made our financial position unmanageable, for approximately three-fifths of the financial support of the school came from voluntary contributions of individuals who wished to list the donation on their income-tax reports.

The damage done to the school by the Attorney General's list compelled the Board of Trustees to discontinue its educational program with the termination of the Winter Term course in March, 1948, and the school has been closed ever since.

We are vitally concerned and alarmed by the hysteria and atmosphere of fear that has pervaded this country in recent years. Manifestly, the activity of the House Committee on Un-American Activities has been a potent contributor to this hysteria and fear as has President Truman's executive order creating a Loyalty program for Government employees with its designation of so-called subversive groups and organizations by the Attorney General. We have followed carefully the prosecution of John Howard Lawson by our Government and we are convinced that he has been a victim of the same hysteria and fear as has our school. The Constitution of the United States has been recklessly ignored or violated by the aforesaid House Committee. We respectfully urge this Court to grant the

petition for certiorari presented by the said Lawson. This Court has an opportunity in this momentous case to debar the aforesaid House Committee from doing violence to the Constitution by seeking a disclosure of personal political opinion. Such a decision would be a great step forward in halting the hysteria and fear that have been inflicted on the people of our Country.

Respectfully submitted,

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MOTION FILED OCT 3 - 1949

Office - Supreme Court,
FILED
OCT 3 1949
CHARLES ELMORE CRO
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

JOHN HOWARD LAWSON,	*Petitioner,*	
vs.		No. 248
UNITED STATES OF AMERICA,	*Respondent.*	
DALTON TRUMBO,	*Petitioner,*	
vs.		No. 249
UNITED STATES OF AMERICA,	*Respondent.*	
EDWARD K. BARSKY, *et. al.*,	*Petitioner,*	
vs.		No. 766
UNITED STATES OF AMERICA,	*Respondent.*	
GEORGE MARSHALL,	*Petitioner,*	
vs.		No. 197
UNITED STATES OF AMERICA,	*Respondent.*	
RICHARD MORFORD,	*Petitioner,*	
vs.		No. 236
UNITED STATES OF AMERICA,	*Respondent.*	
HELEN PARKER, *et al.*,	*Petitioner,*	
vs.		No. 49
COUNTY OF LOS ANGELES, *et al.*,	*Respondent.*	

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONGRESS OF AMERICAN WOMEN AS AMICUS CURIAE ON PETITIONS FOR WRITS OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES THEREOF.

These cases present important questions affecting the breadth of the protection afforded by the First Amendment. Upon their determination may very well depend the preservation of the guarantees of speech from alteration by ingenious maneuvers designed to circumvent the

protective principles which this Court has declared guard the liberties embodied in the First Amendment.

The Congress of American Women, dedicated as it is to the maintenance of these basic freedoms, seeks to appear here as amicus curiae so that it may call attention to the broad implications and effect of the decisions below upon the course of civil liberties in this country.

Consents to the filing of this brief have been received from the Attorney General of the United States, and from each of the respondents, except respondent Marshall, from whom no response had been received at this date. The County Counsel of Los Angeles has granted only a qualified consent. The Congress of American Women, therefore respectfully prays that it be permitted to file the attached brief as amicus curiae.

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BRIEF OF THE CONGRESS OF AMERICAN WOMEN AS AMICUS CURIAE ON PETITIONS FOR WRITS OF CERTIORARI

STATEMENT

The Congress of American Women is the American branch of the Women's International Democratic Federation, an organization of 81,000,000 women representing fifty-seven nations of the world. This great assemblage of women was constituted at the close of the last war to extend and protect the frontiers of democracy, and to work for the establishment of such conditions of social, economic and

political well-being, that women everywhere might fearlessly bear their children and live with their families in security, freedom and peace. Recognizing, in the best tradition of American democracy, that it is only in a climate in which the opportunity exists for a free trade in the marketplace of ideas, that these objectives may be achieved, this organization adopts as one of its prime objectives the fostering and defense of the civil rights and liberties of the people of the United States.

The history and background of these five prosecutions reveals a shocking incursion by government in the liberties absolutely reserved by the people to themselves by the Bill of Rights. They typify a form of political repression that has recently spread like a rash across the face of this country. The petitioners herein represent the first victims — and are yet only a scattered sampling — of a brutal, fascist philosophy of government, which has as its objective the establishment of a single standard of thought and expression, acceptance of which, and conformity to which, is coerced by any means, fair or foul, including economic sanctions, exposure to public obliquy, and the terrible threat of prosecution and imprisonment.

It has always been our belief that the first premise of our American freedom was bottomed on the tenet that:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." (*Board of Education v. Barnette,* 319 U. S. 624, 642.)

Rejection of the doctrines hereinabove expressed has once before, of recent memory, plunged many nations into the darkness of fascism and catapulted the entire world into the horror of a fascist-conceived war. It is these considerations, and concern for the prevention of like consequences, that impel this organization to submit this brief amicus curiae.

ARGUMENT

The essence of democracy lies in the sovereignty of the people over their government; a belief in its principles is based upon a reliance on the reason and judgment of the entire people, a confidence in the superiority of such collective reason and judgment over the wisdom of any particular individual or group. In order to realize democracy, it is essential that the minds of the people remain wholly independent of government itself. For if the government can direct or control or, by coercive methods, influence the popular judgment, ultimate political power has, in essence, been transferred from the people themselves to the government which was to be subject to their direction, and the essential basis of democracy has thus been lost.

It was for this reason, that the Constitution excluded government entirely from the exercise of powers in the domain of ideas. The very foundation upon which the Constitution rests requires that the government be forbidden to interfere in any way with what people might believe, hear, discuss and read, be prohibited from cutting off any phase of the nourishment for the processes of human thought.

When the Constitution was first proposed, the exemption of the area of expression from the sphere of governmental authority was not made explicit in its terms. The people who were then asked to ratify it refused to leave so vital a matter to implication. They would not accept the assurances of those who had written it that the exemption was intended. The guarantee which they extracted appears in the Constitution in the unequivocal language of the First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

There is no equivocation in this language; it boldly and forthrightly declares that Congress shall make *no law* abridging the freedom of speech, *no law* prohibiting the free exercise of religion, *no law* limiting the freedom of press, of peaceable assembly and petition.

In light of the purposes for which it was adopted, it could not have been otherwise. For the slightest limitation would, in effect, destroy the guarantee. If such a limitation existed, government, acting through its legislature, its executive, its courts, would necessarily be empowered to determine its scope. By extending or restricting the limitation, government could then extend or restrict the freedom itself. The independence of the people's will from government control would thus be placed at the mercy of government itself; popular sovereignty over government would be effectively replaced by government dominion over the minds of men.

The strict adherence of the United States to the basic principles of its form of government is further expressed by its proposals to the other nations of the world in the United Nations assembled, following upon the war to end the tyranny of Hitler fascism. Among the proposals for a Declaration on Human Rights, the American representative suggested:

> "Everyone has the right to freedom of information, speech and expression, to freedom of religion, conscience, and belief; to freedom of assembly and of association; and to freedom to petition his Government and the United Nations."

To the draft covenant on Human Rights, the representative of the United States proposed:

> "Everyone shall have the right to freedom of information, speech and expression. Everyone shall be free to hold his opinion without molestation, to receive and seek information and the opinion of others from sources wherever situated, and to disseminate opinions and information, either by word, in writings, in the Press, in books or by visual, auditive or other means."

Seen in this light, the enabling resolution of the House Committee on Un-American Activities, its activities, its inquiries, the establishment, existence and functions of "loyalty" boards, state or federal, "loyalty" oaths and "loyalty" investigations, are in patent violation of the Constitution, and constitute a usurpation of power by the legislative and executive branches of the government which promulgate and foster them.

Stripped of all their trappings, the naked truth of these witch-hunts is that the government is invested with the power to punish thought, speech, advocacy and association, whenever it sees fit to do so. It gives the government the power to enter the market-place of ideas from which the Constitution excluded it.

For the last decade the House Committee on Un-American Activities has conducted a limitless inquiry — from which these prosecutions result — into the beliefs, associations and opinions of the American people. The Committee demands conformity, complete and absolute support for government policies, foreign or domestic. Conversely, the Committee has endeavored to suppress every idea of social change, to persecute, pillory and stigmatize every individual or organization opposed to the policies of government. These same tactics and inquiries are carried over by Federal and State "loyalty" boards under the guise of employing in government positions "non-subversive" persons only. The total effect of these so-called "investigations" of subversion cannot be overlooked as serious depredations on the fundamental rights of Americans, with profound restrictive effects on their freedom of thought and action. Two judges of the Circuit Court have voiced their observations on the inroads which the Committee has made on freedom of opinion and conduct.

> "Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry and shall be subject to

prosecution for any collateral crimes which may have been disclosed, and generally shall be exposed pitilessly to public condemnation. That it is successful in its purpose the daily papers show. There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinion which is thus achieved." (Clark, J., dissenting in *United States* v. *Josephson,* 165 F.(2) 82,100 (CCA 2d, 1947), *Cert. den.* 68 S. Ct. 609.)

"That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the Court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroads the Committee has made in the American sense of freedom to speak. There has been some suggestion that it restrains only timid people. I think it is nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. (Edgerton, J., dissenting in *Barsky v. United States,* 167 F. (2) 241, 254, 255 (App. D.C., 1947), *cert. den.* 68 S. Ct. 155, petition for rehearing pending.)

Such a tampering with fundamental guarantees must not be permitted. It devolves on this Court to strike down these unconstitutional invasions of freedom of conscience, belief, thought, speech and association, and reaffirm the right of the people to express themselves freely and without fear, that they may themselves, after open discussion and free communication, sit in judgment of the issues before them.

CONCLUSION

The Congress of American Women, therefore, urges that this Court grant the Petitions for Certiorari herein, take jurisdiction of the cases and reverse the decisions below.

Dated: New York, New York
September 29, 1949.

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IN THE

Supreme Court of the United States

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UNITED STATES OF AMERICA

No. 766

EDWARD K. BORSKY, et al.

v.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO FILE BRIEF AS AMICII CURIAE AND BRIEF

The undersigned Trade Unions respectfully move for leave to file a brief amicii curiae in support of the petitions for certiorari and the application for rehearing on a petition for certiorari in the matters herein. The written consent of petitioners and respondents to these applications have been filed with the Clerk of this Court.

Statement

The petitioners in the above cases now before this Court for its consideration were convicted of contempt of the House Committee on Un-American Activities. The Trial Court refused to permit the petitioners to show that the purpose and functioning of the House Committee's investigation was to institute a blacklist based upon the exercise of constitutional rights of press, speech and assembly. The existence of such a blacklist designed to restrain the exercise of constitutional rights violates the guarantees of speech, press, assembly and political activity in the Bill of Rights. Conduct on the part of a Congressional committee which so violates the most fundamental guarantees of constitutional democracy transcends the limits which the Constitution places upon the Congressional investigatory power. The activities of a Congressional committee directed towards such unconstitutional ends lying beyond the scope of Congressional power should not be the basis for a proceeding in contempt.

The petitioners in their briefs to this Court have urged that the Committee's utilization of Congressional power to compel disclosure of private political opinion and association is forbidden by the First, Fourth, Fifth, Ninth and Tenth Amendments, and that the Statute creating the Committee is unconstitutional on its face in that it permits congressional invasion into the protected domain of ideas, speech, press and assembly. As trade unions representing the interests of working men and women, we associate ourselves wholeheartedly with these arguments. The

trade union movement depends for its very existence upon the free, untrammelled exercise of the democratic liberties contained within the Bill of Rights.

While the actions of the House Committee on Un-American Activities have caused considerable fear for the preservation of constitutional liberties on the part of Americans in all walks of life, as representatives of working men and women organized into trade unions, we must call the attention of this Court to one aspect of the Committee's functioning which seriously threatens the existence of a free and independent trade union movement.

The records in the cases now before the Court indicate that the House Committee on Un-American Activities has resurrected from the darkest recesses of our history one of the most despised and feared weapons of industrialists bent on destroying the constitutional rights of working people—the blacklist.

The record in one of the cases before this Court—that of John Howard Lawson reveals that one of the most fundamental purposes of this entire phase of the Committee's activity was to create a blacklist of undesirable individuals in their respective industries. Prior to the investigation, a subcommittee of the House Committee went to Los Angeles in the Spring of 1947 and after examining a number of motion picture producers called upon them to discharge and suspend certain writers and directors. The producers had first rejected this demand of the subcommittee. Later in the summer of 1947, the Committee sent certain investigators to Hollywood who urged the producers to "clean out their houses of certain writers * * * else there would be trouble in the industry from the House Committee." (Joint Appendix, Petition of John Howard Lawson, #248, pp. 312-316.)

During the hearings of the House Committee, the Motion Picture Producers Association were urged to establish a blacklist of individuals whose supposed views and affiliations were disapproved by the Committee. Following the close of the hearing, the motion picture industry gave in

to the House Committee's demand for a blacklist and 10 individuals, including two of the petitioners in the cases now before this Court were blacklisted by the industry. Contracts were terminated and further employment in any branch of the industry was denied to all of them. The Committee thereafter claimed the credit for these discharges and the establishment of this blacklist. (Congressional Record, Nov. 24, 1947, at p. 10890.)

I

The blacklist has been traditionally utilized to restrain working people from exercising constitutional rights.

Throughout the entire course of the history of this country, the industrial blacklist has been one of the traditional weapons utilized on every occasion to terrorize working people from exercising their constitutional rights to organize and bargain collectively. Judge McGruder, for the First Circuit Court of Appeals, aptly described the significance of the use of a blacklist:

> "* * * A long experience had shown that one of the most provocative and effective means by which employers sought to impede the organization of workers was the blacklisting of union men, thereby denying them opportunities for employment. See Final Report of the Industrial Commission (Government Printing Office: H. Doc. No. 380, 57th Cong., 1st Sess., 1902), Vol. XIX, pages 892-893, 952; Encyclopedia of the Social Sciences (1935) Vol. II, pages 578-579; Commons and Associates, History of Labour in the United States (1926) Vol. 1, pages 362-363, 420-422; Sub-com. of the Senate Comm. of Education and Labor, Preliminary Report, Sen. Rep. No. 46, 75th Cong., 1st Sess., 1937, page 8, Daugherty, Labor Problems in American Industry (1933) pages 389-390; Patterson, Special Aspects of Industry (2d ed. 1935)

pages 402-403; Cummins, The Labor Problem in the United States (2d ed. 1935) page 351."

National Labor Relations Board v. *Waumbec Mills, Inc.*, 1940, 114 F. 2d 226.

The history of the long struggle of the American working people to exercise their constitutional rights is filled with examples of the use of the blacklist. From the very beginning of the development of industrialism in this country employers resorted to the blacklist to hold their workers in subjugation. In the 1820s the Mill owners in Waltham, Lowell and Lawrence had an effective blacklist system which made it impossible for any worker to obtain employment with the new company without the approval of the former employer.[1]

During the earliest struggle for a shorter work day, the fight in the 1840s to establish a 10-hour day, the employers answered these rudimentary efforts of the workers to improve their working conditions with the institution of wholesale blacklists. Workers who refused to sign contracts with the employers permitting a work day of over 10 hours were threatened that their refusal to sign would result in their being blacklisted in the entire industry.[2]

When the metal trades workers organized their first union during the Civil War years, the Association of Engineers of New York issued a secret directive establishing a blacklist of union workers throughout the industry.[3] When the brewery workers in New York in the 1870s formed a trade union to fight for a 10-hour day and a wage of 50¢ an hour, their organizing activities were smashed through the institution of an industry-blacklist. The members of the union were barred from employment and many of the

[1] See, *The Labor Movement in the United States*, Philip S. Foner, p. 101, 1947.

[2] Foner, cited supra, p. 211.

[3] Foner, cited supra, p. 353.

leaders had to leave their home communities.[4] When the iron and metal workers in up-state New York in the 1880s organized to fight a wage cut of 20%, the companies involved retaliated with an industry blacklist.[5]

One of the first major attempts of railroad workers to organize into a national union to defend themselves against the powerful railway industrialists was destroyed by the institution of a national blacklist. The blacklist which smashed the American Railway Union in the 1880s has never been forgotten by the organized trade union movement. For years after the defeat of the famous Pullman strike, railway men who had joined the American Railway Union were denied employment throughout the entire country.[6]

The steel trust met the earliest efforts of steel workers to organize together for their mutual protection with the weapon of the industrial blacklist. The City Editor of the *Pittsburgh Leader* testified in 1912 before the Stanley Investigation Committee that he had in his possession a list of 3,000 former employees of the Carnegie Steel Company who were blacklisted for union activity from obtaining work in the steel mills.[7] Similarly, the National Metal Trades Association faced with the first efforts by workers in this industry to utilize their constitutional rights to organize, set up a widespread system of industrial blacklist through a spurious employment bureau with branches in many large cities.[8]

It is no coincidence that after the first World War during the surge of union-smashing activities engaged in under the name of the "American Plan", the industrial blacklist

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[4] *The Labor Movement in the United States,* 1860-1895, Norman J. Ware, 1929, p. 222.

[5] Ware, cited supra, p. 340.

[6] *The Bending Cross,* Ray Ginger, Rutgers University Press, 1949, p. 182.

[7] *Boycotts and the Labor Struggle,* Harry W. Laidler, 1913, p. 44.

[8] Laidler, cited supra, p. 47.

was a principal weapon of employers bent on destroying the constitutional rights of working people. Under this so-called "Plan" open shop associations composed of Manufacturers' groups, Boards of Trade, Chambers of Commerce, Bankers' associations and many others joined together to maintain blacklists of union men and women.[9] The American Bankers Association in their magazine *Industry* stated openly that the purpose of this "Plan" was to save the workers from "the shackles of organization to their own detriment".[10]

In the years directly following the economic crisis in 1929, employers constantly resorted to the blacklist in a feverish attempt to stem the tide of union organization encouraged by the harsh necessities of the times. Out of the countless stories contained in the records and proceedings before the National Labor Relations Board in the early years of the Wagner Act, of the use of the blacklist to terrorize workers from exercising their legal and constitutional rights to self-organization the experience of the employees of the Fruehauf Trailer Company is a vivid example. A member of the National Labor Relations Board stated to a Congressional Investigating Committee:

> "I have never listened to anything more tragically un-American than stories of the discharged employees of the Fruehauf Trailer Co., victims of a labor spy. Man after man in the prime of life, of obvious character and courage, came before us to tell of the blows that had fallen on him for his crime of having joined a union. Here they were—family men with wives and children—on public relief, blacklisted from employment, so they claimed, in the City of Detroit, citizens whose only offense was that they had ventured in the land of the free to organize as employees to improve their working conditions. Their reward, as workers

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[9] *American Labor Unions*, Florence Peterson, Bureau of Labor Statistics, Department of Labor, 1945, p. 16.

[10] From a statement of policy of the American Bankers Association in the magazine *Industry*, Jan. 1, 1921, cited in Peterson, at p. 16.

who had given their best to their employer, was to be hunted down by a hired spy like the lowest of criminals and thereafter tossed like useless metal on the scrap heap." [11]

The early years in the struggle to establish and maintain a union among the mine workers are filled with the terror of the industry-wide blacklist. Mr. John Mitchell, one of the first officers of the United Mine Workers, testified as follows before the Industrial Commission in hearings held in 1899:

> "The blacklist has been one of the worst weapons organized labor has had to contend against. For instance, if a miner was discharged by a coal company for insisting upon better conditions, or trying to induce his fellow workmen to join his labor organization, he found it impossible to find employment in the State where he then resided. It has always been difficult for our organization to secure proof that this method has been resorted to by employers. It is a well-known fact, however, that in the State of West Virginia, if a man dares to assert the rights guaranteed, he is deprived of the opportunity to earn a living for himself and family by his employment, and many times is unable to secure employment at any other mine in the State." [12]

Before the same Commission, the President of the Colorado Federation of Labor, testified from his own experience as to the utilization of the blacklist:

> "I know from my own experience that men are kept from positions in all parts of the State of Colorado because of their connection with organized labor. • • • They (the employing class) practically have the power

[11] Preliminary Hearings before the LaFollette Committee, p. 291. Compare also cases before the National Labor Relations Board holding blacklisting to be discrimination, violation of the NLRA:

Stewart Die Casting Corp., 14 NLRB 872;

Grower-Shipper Vegetable Ass'n of Central Col., 15 NLRB 322;

North American Refractories Co., 52 NLRB 1049.

[12] *Industrial Commission Report*, Vol. 12, p. 37, April 11, 1899.

> to say that a man shall not have work; to destroy his credit with the merchants; to destroy or make valueless what little property he has; to separate him from his family and make him a wanderer upon the face of the earth." [13]

The functioning of a blacklist is simple and forthright in its ruthlessness. It deprives a man of the opportunity to earn a living to support himself and his family. It conditions the exercise of the constitutional rights upon starvation. It holds hostage a man's wife and children. It is a most pitiless weapon in the arsenal of reaction. An observer of the American labor scene at the turn of this century described its effectiveness in these terms:

> "Blacklisting has the merit of being very effective. Its edict is final; it troubles no jury; sends for no sheriff; its machinery is purely clerical, with the magnificent advantage of being operative wherever its agencies exist. It has its watchdog by every door, and woe to the man who, with its brand on his brow, seeks work and bread in any one of its departments." [14]

Another student of American labor history wrote:

> "A man who for any reason, be it even whim, caprice, or personal spite, falls into disfavor with his employer is placed on the blacklist, and his name, at times accompanied by a personal description, is sent to the allied employers all over the country. * * * The blacklist will pursue a man for years, will drive him out of an honest trade * * * and will follow him across the continent, and everywhere defeat his efforts to gain a livelihood." [15]

Wherever the technique of the blacklist has come before the courts it has been rejected as a device destructive of

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[13] *Industrial Commission Report*, Vol. 12, p. 248.

[14] Woodrow, *Labor Problems*, pp. 288-289.

[15] Ely, *The Labor Movement in America*, p. 110.

human rights and violative of constitutional protections.[16] The courts have frequently lent their power to restrain the existence of such blacklists.[17] Many states have outlawed the blacklist by statute.[18]

The resurrection of the blacklist in any form has always met with the unanimous disapproval of every section of the American people. The unashamed elevation to the Congressional level of this infamous technique for destroying constitutional rights represents an open challenge to the entire fabric of constitutional democracy.

It is little wonder that working people organized into trade unions regard with considerable dismay the open attempt by a committee of Congress to reestablish the long repudiated technique of the blacklist.

Neither Congress nor any agency of the executive arm of the government may condition or proscribe the exercise

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[16] A congressional blacklist designed to exclude certain individuals from government employment was stricken down by this Court in *U. S.* v. *Lovett,* 328 U. S. 303; see also *Cummings* v. *State of Missouri,* 4 Wall. 277. Similarly, blacklists in private industry have been repudiated by this Court. See, for example, *Phelps-Dodge* v. *NLRB,* 313 U. S. 177; *NLRB* v. *Wambec Mills, Inc.,* 1114 F. (2d) 226. Examples of State Court decisions are *Cornellier* v. *Haverhill Shoe Mfgrs. Ass'n,* 221 Mass. 554; *Hundley* v. *Louisville Railroad,* 105 Ky. 162; *Joyce* v. *Great Northern Railway,* 100 Minn. 225; *Atkins* v. *W. & A. Fletcher Co.,* 65 N. J. Eq. 658; *Willis* v. *Muscogee Mfg. Co.,* 120 Ga. 59.

[17] See, for example, *Carpenters Union* v. *Citizens Committee,* 333 Ill. 225. In that case the Court enjoined a committee of citizens without direct interest in the industry which attempted to coerce employers not to employ union members by threatening them with loss of business and unfavorable publicity.

[18] Ala. Code 1928, S3451; Ark. Pope's Digest 1937, S9121; Calif.; Labor Code 1937, S1050, 1051; Fla. Fen. Laws 1927, S6606, 7773; Ill. Smith-Hurd Ann. Stat., c. 38 S139; Iowa Code 1935, S13253; Minn. Mason's Stat. 1927, S10378; Mo. Revised Stat. 1929, S4255; N. Y. Penal Law S580; Wash. Rem. Rev. Stat. S2382 (5); Wis. Stat. S343, 682.

of the rights of speech, press or assembly.[19] The institution of a blacklist to restrain the exercise of constitutional rights, whether it be the fundamental right of self-organization or the exercise of the rights of speech, press and assembly, or the exercise of the political rights embodied in the First, Ninth and Tenth Amendments, is in itself conduct violative of the Constitution.

When Congress following the urging of the House Committee on Un-American Activities sought to establish a blacklist of certain individuals from obtaining employment in the Federal government, this Court struck down this device as a bill of attainder, violative of the Constitution. In response to the theory of some that such a Congressional blacklist lay beyond the reach of this Court, Mr. Justice Black replied:

> "Were this case to be not justifiable, congressional action aimed at three named individuals which stigmatize their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our constitution did not contemplate such a result."

When a committee of the Congress, equally bound by the mandates of the Constitution, engaged in such unconstitutional conduct, it is likewise essential that this Court correct this abuse of Congressional power.

This attempt of the House Committee on Un-American Activities to set up a widespread system of blacklisting fundamentally threatens the constitutional rights of working people. The House Committee has on many occasions attempted to interfere with the legitimate activities of

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[19] *United States* v. *Lovett*, 328 U. S. 303; *Thomas* v. *Collins*, 323 U. S. 516; *Follett* v. *Town of McCormick*, 321 U. S. 573; *Martin* v. *Struthers*, 319 U. S. 141; *Cantwell* v. *Connecticut*, 310 U. S. 96; *Thornhill* v. *Alabama*, 310 U. S. 88; *Schneider* v. *New Jersey*, 308 U. S. 147; *Herndon* v. *Lowry*, 301 U. S. 242; *DeJonge* v. *Oregon*, 299 U. S. 353.

trade unions.[20] This Court has long held that the right of workers to organize and bargain collectively is a fundamental right protected by the Constitution. *Amalgamated Utility Workers* v. *Consolidated Edison,* 309 U. S. 261; *NLRB* v. *Jones & Laughlin,* 301 U. S. 1; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184. The organization of workers into trade unions involves the utilization of the rights of speech, press and assembly guaranteed by the First Amendment. *Thomas* v. *Collins,* 323, 516; *Thornhill* v. *Alabama,* 310 U. S. 88; *AFL* v. *Swing,* 312 U. S. 321; *Hague* v. *CIO,* 301 U. S. 496. In short, the existence of the trade unions have been recognized by this Court as the primary means through which working people utilize the First Amendment as a charter of political democracy. *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88.

Any attempt to restrict or suppress this fnudamental right of working people to organize and bargain collectively violates the Constitution. *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88. The institution of a blacklist is one of the most severe restraints upon the exercise of the constitutional right of self-organization. There can be no more serious deterrent to the utilization of constitutional rights than the deprivation of the right of a working man to earn a living.

The very existence of constitutional liberties insofar as they relate to the rights of working people depend upon the repudiation by this Court of the institution of the blacklist in any form whatsoever. For this reason the

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[20] See, for example, *The Dies Committee, a Study of the Special House Committee for the Investigation of Un-American Activities,* 1938-1944, August Raymond Ogden, FSC, Catholic University of America Press, 1945; Ogden's exhaustive study of the functioning of the House Committee on Un-American Activities reveals that the House Committee actively intervened on the side of employers in almost every major industrial dispute during the period of its existence. See, *The Dies Committee,* cited supra, pp. 53, 55, 75, 183, 239, 243.

undersigned trade unions, as associations of working men and women, urge this Court to grant the petitions herein.

Respectfully submitted,

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OCT 17 1949
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

October Term, 1949

No. 248

JOHN HOWARD LAWSON

vs.

THE UNITED STATES OF AMERICA

No. 249

DALTON TRUMBO

vs.

THE UNITED STATES OF AMERICA

No. 766

EDWARD K. BARSKY, ET AL.

vs.

THE UNITED STATES OF AMERICA

No. 197

GEORGE MARSHALL

vs.

THE UNITED STATES OF AMERICA

No. 236

RICHARD MORFORD

vs.

THE UNITED STATES OF AMERICA

No. 49

HELEN PARKER, ET AL.

vs.

COUNTY OF LOS ANGELES, ET AL.

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Methodist Federation for Social Action, prays leave of this Court to file this Brief Amicus Curiæ in the above-entitled case.

Petitioner organization deems it imperative in the interest of the preservation of liberty and democracy in the nation that this Court grant certiorari in the cases here and resolve the grave questions of constitutional law presented, particularly those touching freedom of speech, press, thought, association and assembly. Petitioner organization is deeply and vitally interested in those issues of law and the preservation of those liberties.

The Methodist Federation for Social Action is a membership organization which speaks for its episcopal, clerical and lay members (not officially for the Church). Its purpose is "to deepen within the Church the sense of social obligation and opportunity to study from the Christian point of view, social problems and their solution; and to promote social action in the spirit of Jesus." It has campaigned for suffrage and democratic civil liberties for all; for racial equality and brotherhood; for social and economic planning to assure full employment and maximum social welfare; for a progressive American foreign policy aimed at ending outmoded imperialism, building the United Nations and uniting the peoples for peace.

The Federation was organized in 1907 and gave birth to the first draft of the Social Creed of the Methodist Church which was later developed into the Social Creed of the Churches, the official statement on social principles

of the Federal Council of Churches, representing the overwhelming majority of American Protestantism. Since its origin, the Federation has helped keep alive the social conscience of the Methodist Church and Protestantism in general, and stimulated similar social action groups in other denominations. Believing that the issues involved in the present case vitally affect the realization of its program and the welfare and liberty of all Americans, the Federation respectfully requests leave to file the following brief amicus curiæ.

These cases concern more than the individual fates of outstanding figures in American cultural and professional life. They involve the very fabric of our constitutional democracy.

The essential design of that fabric is the principle of popular sovereignty, of government only by the consent of the governed. Its warp and woof is the doctrine that the will of the people themselves is primary to the aims and policies of any group of public officials. And the realization of that principle, the implementation of the primacy of popular will over governmental authority, depends upon the impotence of such authority to mold that will. "Authority here," said Mr. Justice Jackson (writing for this Court in *Board of Education* v. *Barnette,* 319 U. S. 624, 641) "is to be controlled by public opinion, not public opinion by authority."

Public opinion, popular will, is determined by what people hear, read and see, by the manner in which they interpret their own experiences and what they can learn of the experiences of others, by the interchange of ideas, by analysis, argument and agitation. Were the government empowered to affect the course of that determination—by granting official favor to one set of ideas, as against another, by obstructing the expression of one point of view and facilitating the expression of others, by harassing and suppressing those with whom it disagreed—it

could in essence fix the ultimate determination itself. Given the power to influence and direct thought and its expression, government could reverse the maxim enunciated by Justice Jackson, could control public opinion instead of being controlled by it, could endow itself with the substance of despotic power. For then would the wielders of governmenal authority be responsible in fact to themselves alone; by enslaving the popular will, they could usurp the popular sovereignty, and become, not the servants but the masters of the people.

Those who fought a bitter, bloody struggle to gain their freedom and independence sought a safeguard against making such a mockery of their sacrifice. They were wary of the temptations of governmental power. They were determined to prevent so easy a subversion of the democratic institutions they were establishing in the Constitution. Accordingly, they insisted upon the incorporation in that document of a specific prohibition against the invasion by government of the area of thought and verbal expression. They sought, by the agency of the First Amendment, to guarantee the inviolability of the mind and will of every American against governmental intervention in any form.

The First Amendment is thus the very foundation of our republican form of government. It is the "matrix, the indispensable condition" of all other liberties, of every institution of our democracy.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." (*Board of Education* v. *Barnette, supra,* at p. 642.)

But the present cases confront us with nothing less than an effort to eclipse that star. Here we have a statute

which purports by its terms to endow a group of public officials—a Committee of Congress—with the power to prescribe what shall be orthodox in matters of public and private life and opinion. Here we have the spectacle of a group of public officials acting under that statute proclaiming its peculiar definitions of heresy in economic, social and political doctrine, bestowing its favor upon the individuals and groups which meet its standards of propriety, thundering its condemnation of those with whom it disagrees, and requiring citizens either to avow the orthodoxy or to confess the heresy the Committee has defined.

To be sure the statute and its creature do not use the terms "orthodoxy" or "heresy"; their characterizations are framed in terms of "loyal" and "subversive," "American" and "Un-American." They do not refer to "social, political and economic doctrine"; the term "propaganda" serves as a substitute. But the meaning, the content is the same. What we have is a group of officials who presume to announce what is right or wrong, acceptable or unacceptable, for Americans to think and write and say. With Congressional approval, they have set themselves up as the definitive interpreters of good and bad American thought. They have assumed the prerogative of applying the seal of official approval to the tenets of certain individuals and groups, and to brand others with the stigma of "subversive." Is this not the official prescription of orthodoxy? Surely, the one fixed star in our constitutional constellation does not fade before an artful epithet.

Upon what basis can such a body, acting in such flagrant violation of the constitutional precepts announced by this Court be permitted to exist? Surely, the failure of the statute to set forth criminal penalties for the Committee-defined heresy is not decisive. This Court has said that "no official, high or petty can *prescribe* what shall be orthodox." (Emphasis added.) Congress may not pun-

ish heresy or "Un-Americanism," for the simple reason that it lacks the power to prescribe that which is to be punished. It is the prescription to which this Court referred, and the lack of power to punish is but a corollary to the lack of power to prescribe.

Moreover, the First Amendment provides broadly that Congress shall make *no law abridging* freedom of thought or expression. It does not confine its prescription to abridgments enforced by fine or imprisonment or injunction. It does not wilt in the face of other repressive devices. This Court has said many times that the Constitution was designed to keep abreast of the times; it must do so above all with regard to its safeguards against the incursions of despotism.

Is not such incursion the function of the Committee with which we are here concerned? It publishes its taboos and relies on other agencies for the imposition of sanctions. Those whom it finds objectionable are publicly vilified, slandered and harassed. Individuals who associate themselves with persons or organizations characterized by the Committee as "Un-American" become the objects of suspicion, of official and unofficial investigation, find themselves deprived of the opportunity for public and private employment, hindered in the pursuit of every normal channel for the fulfillment of their lives. It is indeed the aim of the Committee to destroy organizations with the purposes of which the Committee disagrees. It has thus attempted to destroy the organization in whose behalf the instant brief is filed, by attacking it, by smearing it, by endeavoring to make persons fearful of participating in that organization's efforts. The Committee's vulgarity is visited upon every group which dares to challenge its sinister program for the destruction of democracy and human decency.

But the effect of the Committee's acts is nowhere more vividly portrayed than in the very facts of the instant cases. Here are individuals who are among the foremost

artists and professionals, with records of a magnificent contribution to our national cultural and professional life, who have been deprived of their jobs, blacklisted, denied the opportunity to perform the arts and professions in which they have demonstrated so extraordinary a genius. Is this not "abridgment" of free thought and expression? Is this not punishment in its cruelest form—all the more unconscionable because it has been administered without any of the safeguards of due process which must, under our system of justice, attend the official deprivation of liberty or property?

But beyond this, these defendants have in fact been sentenced to fine and imprisonment. It is that sentence indeed which this Court is asked to review. And it flows directly from the exercise by the Committee of the powers prohibited to it by the Constitution. These defendants were tried and convicted because they refused to submit to coercive inquisition into their personal and organizational beliefs and political associations. Their conviction, therefore, rests squarely upon the Committee's invasion of the area of free thought and expression. It is based entirely upon the Committee's action in setting standards of orthodox political thought and association and presuming to determine whether particular individuals meet the standards thus declared.

There is no room for subtlety here. Stripped of nice technicalities, we are presented with a crude effort on the part of an agency of government to cast public opinion in the narrow mold that agency has itself prepared. We are faced with the exercise by a group of public officials of a prerogative never before assumed in our entire history—that of formulating for every American standards of thought and expression and association, and of compelling conformity to those standards under pain of penalties. We are confronted by a group of men who propose to foist upon us an ironclad censorship of every organ of expression, of every cultural and political form. We are

faced with the persecution of individuals who courageously challenge the power of any official to compel their acceptance of these standards of thought, who refused to submit to an inquisition in those spheres wherein the Constitution grants them immunity from government intrusion.

The action taken against the defendants herein carries with it a grave threat to the foundations of democracy. We cannot compromise with despotism; it must be resisted wherever it appears. If our constitutional liberties are to retain the life and vitality with which they were originally invested, these monstrous convictions must be set aside.

Respectfully submitted,

LEO J. LINDER,
Attorney for The Methodist Federation for Social Action.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of ....., A. D. 1949.

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IN THE

Supreme Court of the United States

No. 248

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 249

DALTON TRUMBO,

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AMICUS CURIAE BRIEF OF THE AMERICAN SLAV CONGRESS

SAMUEL NEUBURGER,
Counsel.

IN THE

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No. 248

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AMICUS CURIAE BRIEF OF THE AMERICAN SLAV CONGRESS

STATEMENT

The American Slav Congress is a non-partisan organization of Americans of Slavic origin. An organization of organizations, it strives to affiliate, coordinate and encourage the activities of Slavic fraternal societies, churches, cultural and social clubs and trade union groups for a united program of peace, economic security and progress.

In 1942 Mr. Paul V. McNutt, then Chairman of the War Manpower Commission, described the contribution of Slavic Americans to the war effort of the United States and their devotion to the ideas of freedom and democracy in the following manner:

> "In this American Slav Congress you have shown the world the miracle of American unity. . . . Millions of those engaged in making war materials are of Slavic birth

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> "In this American Slav Congress you have shown the world the miracle of American unity. . . . Millions of those engaged in making war materials are of Slavic birth

> or descent. You American Slavs helped to build America. Our great bridges and dams and steel cities are monuments to a million unknown Slav immigrants. . . . Today you are helping defend what you have made. Every division of our Army, every ship of our Navy, every squadron of our Air Forces, number servicemen with Slavic names. The armies of freedom are waiting with terrible eagerness for the weapons you will make. Armies of your race—the unbeaten and unbeatable Slav. . . . Following in your Slav traditions, I know that America can still rely on you to do the impossible!"

In the exercise of that political responsibility which stems from a continuing and unshakable devotion to the ideas of freedom and democracy the American Slav Congress herewith respectfully requests leave to file the following brief amicus curiae.

ARGUMENT

No route, no matter how circuitous, must be open to those in our society who would deny the following rationale of our faith:

> "Because in a democracy the people must have the right to choose the good from the bad ideas, no governmental authority . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Board of Education* v. *Barnette*, 319 U.S. 624, 641, 642 (1943).

Indeed,

> "The very purpose of the First Amendment is to preclude public authority from assuming a guardianship of the public's mind through regulating press, speech and religion. In this field every person must be his own watchman for truth, because the forefathers did not want any government to separate the truth from the false for us." *Thomas* v. *Collins*, 323 U.S. 511, 545 (1945).

These cases, in that they involve departures from the above stated principles, bring before this Court an issue which goes to

the very core of our constitutional democracy. They clearly instance attempts by governmental bodies to regulate the speech, the thoughts and the associations of the sovereign people. For this Court to do otherwise than to strike down these legislative and executive usurpations of rights reserved to the people in the First Amendment to their Constitution would be to abdicate the function ascribed to the Judiciary in the same Constitution. The American Slav Congress vigorously commends to this Court the contention that Section 121(b)(1)(q), Legislative Reorganization Act of 1946, P. L. 601, Chap. 753, 79th Cong., 2nd Sess. 60 Stat. 828, amending Rule XI(1) (2) of the Rules of the House of Representatives exceeds the boundaries of legislative power under Article I of the Constitution in that it is legislation designed to regulate the content of speech and ideas.

It is, however, with the illegal tactic of "exposure" adopted by the House Committee on Un-American Activities, that this amicus curiae seeks particularly to concern itself. For the said Committee's claim that it may use its investigatory power generally to "expose" on the premise that "exposure" is a permissible end in itself* constitutes an attack upon our historic freedoms no less vicious by virtue of its indirection. Investigation and exposure may be inevitable by-products of the proper exercise of the legislative power in aid of a constitutional objective (*United States* v. *Harris*, 106 U.S. 629, 636), but such by-products may not be made ends in themselves. When, in fact, such improper ends are sought in circumvention of a clear prohibition on legislative action by this House Committee, they must be specifically and particularly condemned.

The First Amendment unequivocally expresses the command of the sovereign people, that Congress "shall make no law" apropos the freedoms of speech and assembly and this may not be interpreted to mean that Congress may make a pseudo-law in these frames of reference. In asserting its own definitions of

* "This Committee is the only agency of government that has the power of exposure . . . there are many phases of un-American activities that cannot be reached by legislation or administrative action. . . ." H.R. Rep. No. 1, 77th Cong., 2nd Sess, 16 (1940). See, also, H.R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939); H.R. Rep. No. 2742, 79th Cong., 2nd Sess., 16 (1940). The Chairman in his final statement at the close of the hearing on Oct. 30, 1947, said: "this hearing has concerned itself principally with spotlighting Communistic personnel in the industry."

"subversive" and "un-American" and in disseminating these definitions over the land by means of sensational public hearings, press releases, newsreels and radio broadcasts, the Committee has propagated a pseudo-law which in fact has delimited the rights and duties of Americans. The Committee has spoken its views on the advocacy of racial equality, adherence to the New Deal, on Henry Wallace, on the conduct of the motion picture industry, on the American Slav Congress—all under color of a claimed constitutional right. This has, of course, had the effect of giving a sufficient tinge of legality to a wholly illegal exercise of legislative power to impress the aforesaid views, in the eyes of the American people, with that Congressional sanction which a law abiding citizenry is customarily wont to heed.

In this manner the House Committee on Un-American Activities has aggrandized to itself the role of arbiter as to the controversial issues of our time and, as such has sought to control and affect the thinking and associations of our people. It has asserted a "guardianship of the public mind." The said Committee's "exposure" of the allegedly un-American activities of screen writers has led the leaders of the motion picture industry to deprive these writers of their right to earn their livelihood in the industry. The content of motion pictures was patently influenced by the Committee's public evaluation of the "subversive" character of certain films. A recent report by the Committee, replete with "facts" colored by the bias of the reporter, has led to the intimidation of hundreds of Slavic Americans in their association with the American Slav Congress. The publication ("exposure") by the Committee of the names of hundreds of individuals who have greeted the said Congress upon one or another occasion has cast a wholly unwarranted tinge of illegality upon the activities of these individuals and intimidated countless others of their friends. In like manner have other organizations with programs opposed by the members of the Committee, been carefully "exposed" to the public.

Executive order 9835 joins the hands of the executive and legislative branches of our government in an outright adoption

of this Nazi-like method of thought control to the American scene. In that, among other evils, it has bred the Attorney General's index expurgatorius, a list of organizations subversive of a government official's conception of loyalty, the said order enables governmental dictation in the areas of speech, thought and association. Here again, the technique of exposure, muffled by an apparently authoritative sanction, effects a pseudo-law which in fact limits the rights and duties of Americans. The government worker may associate freely, that is in disregard of his government's interdiction of certain organizations, only at the risk of sacrificing his freedom to work. Mr. Justice Hughes, speaking for a unanimous court in *De Jonge* v. *Oregon*, 299 U.S. 353 described the American's right so to disregard this type of interdiction as: "of the essence of his guaranteed personal liberty."

The evil allowed spreads however, beyond the invasion of personal right. The existence of the Order and the above-mentioned list bars the relatives and friends of the Federal employee from bespeaking their opinions and associating freely. They may do so only at the risk of clouding the employee's record. Students contemplating governmental careers must associate free of idealistic or intellectual motivation, a freedom heretofore absent from the lexicon of democracy. The repressive arm of the Loyalty Order reaches out to the men of our factories operating under government contract, to scientists in laboratories, to employees of the governments of States which have followed the lead of the Order. It is plain that listed organizations, carefully "exposed" to the people in a setting of bias ensured by non-publication of the evidence of their "subversiveness" and denial of all the procedural rights which form our revered concept of "due process," are effectively outlawed for vast numbers of our people. The programs and policies of these organizations are taboo. The vague standard, the hierarchical sanction above question, the concept of guilt by association—these true subversions of democracy, if left unchecked by this Court, will lead inevitably to an undermining of the very roots of the American way.

CONCLUSION

The right, the will and the power of the American people to govern themselves rests upon the unrestricted freedom to judge the content of ideas for themselves. Governmental intervention in the exercise of this judgment, under whatever guise, necessarily restricts this freedom. The American Slav Congress, therefore, prays that these convictions be set aside.

Respectfully submitted,

AMERICAN SLAV CONGRESS,
SAMUEL NEUBURGER,
Counsel.

CASES CITED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 248

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

No. 249

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF THE AMERICAN JEWISH CONGRESS AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICI CURIAE IN SUPPORT OF THE PETITIONS

The undersigned organizations respectfully urge that the petitions for writs of certiorari in the above cases be granted so that there may be a final determination of the issue whether a witness, subpoenaed before the House

Committee on Un-American Activities, may be punished for refusal to answer the question: "Are you a member of the Communist Party?" Counsel for petitioners and respondent have consented to the filing of this memorandum.

The American Jewish Congress was organized "to safeguard the civic, political, economic and religious rights of Jews everywhere" and "to help preserve, maintain and extend the democratic way of life in the United States." The American Jewish Congress is, therefore, utterly opposed to totalitarianism because it is inconsistent with democracy. It is further opposed because it recognizes that totalitarianism, whether of the right or the left, is peculiarly the foe of Jewish survival. The former seeks and achieves the destruction of the Jew through degradation and persecution. The latter renders Jewish survival impossible by proscribing the free development of Jewish cultural and spiritual values without which Jewish existence cannot be maintained.

The National Association for the Advancement of Colored People is a membership organization which for forty years has dedicated itself to and worked for the achievement of a functioning democracy as well as equal justice under the Constitution and laws of the United States.

A great number of the motion pictures to the production of which petitioners contributed consistently showed the Negro minority group in a truer light than it had previously enjoyed. Far from being un-American in character, these pictures were among the first to portray an unstereotyped Negro. Therefore, the National Association for the Advancement of Colored People believes that the attack on petitioners is in part an attack on the basic struggle for equality of all people, regardless of race, creed, color or nationality.

We respectfully submit that the present petitions should be granted because, whether or not the Communist Party is dedicated to achieving some form of totalitarian government in the United States, these cases involve the basic

question whether there are any constitutional limitations (apart from the privilege against self-incrimination) upon the Congressional power of investigation. The answer to that question will define the powers of Congress in important respects.

In urging that an answer to this question be given, we do not minimize the importance or value of Congressional investigations. Only an informed Congress can wisely decide whether legislation is needed and, if needed, what legislation should be enacted to forestall, with due regard for the Bill of Rights, acts endangering our democratic system of government. We recognize, too, that due respect for a coordinate branch of the Government must require the judiciary to weigh carefully any petition that it restrain the exercise of the Congressional power of investigation. For we recognize that in most instances such restraint must come, if at all, from the political disapproval of the electorate.

Nevertheless, this Court recognized as long ago as 1881 that, in a constitutional democracy, it is essential that the judiciary have some supervision over attempts by Congress to enforce its power of investigation. In *Kilbourn* v. *Thompson,* 103 U. S. 68 (1881), this Court considered at length the much debated question whether Congressional Committees had power to conduct fact-finding investigations. Without deciding that question, and assuming that the power existed, this Court held that the power was subject to certain limitations which the courts could not ignore. Thus, it was held that the Senate or the House of Representatives could require testimony only "in a matter into which that House has jurisdiction to inquire, and * * * that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen" (103 U. S. at 190), "If they are proceeding in a matter beyond that legitimate cognizance, *we are of opinion that this can be shown* * * * otherwise the limitation is unavailing and the power omnipotent" (*id.* at 197). When the power of a House to inquire is called

"in question • • • it should receive the most careful scrutiny" (*id.* at 192, emphasis supplied).

These principles remain valid today. As recently as 1929, this Court quoted with approval Mr. Justice Field's statement that the *Kilbourn* case "will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." *Sinclair* v. *United States,* 279 U. S. 263, 293 (1929). See also *Interstate Commerce Commission* v. *Brimson,* 153 U. S. 447, 478 (1894); *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407 (1908); *In re Chapman,* 166 U. S. 661 (1897). In *McGrain* v. *Daugherty,* 273 U. S. 135 (1927), this Court held that the Congressional power "is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts" (273 U. S. at 166). Accordingly, it held that "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry" (*id.* at 176).

These cases establish that the Congressional power to investigate is limited and that when the power of a court is invoked to implement a challenged exercise of that power, it must determine "for itself" whether the exercise was proper. *Kilbourn* case, *supra,* 103 U. S. at 106. They indicate also that essentially different considerations apply where the issue is whether a witness may be punished because of his refusal to answer a question and where the issue is whether the inquiry itself may be enjoined. The cases establish that the former is justiciable, whether punishment is by criminal conviction or by imprisonment by vote of either House. The latter we conceive to be a matter for political redress and to present a political question outside the jurisdiction of the courts. Accordingly, review and reversal of the convictions in these cases would not prevent the continued functioning of the House Committee on Un-American Activities, but would leave that matter to the wisdom of the House of Representatives.

Since the present cases do involve conviction and punishment, they raise the following questions, among others, which this Court has not yet decided:

1. May a private individual be punished for his refusal to answer questions about his political affiliations, put by a Congressional Committee, regardless of the relevance of the question to an appropriate function of that Committee?

2. May a witness before a Congressional Committee be punished for refusing to answer a question the purpose of which is solely to stigmatize and disgrace him and deprive him of his livelihood?

3. May a witness before a Congressional Committee be punished for his refusal to answer an inquiry concerning his conduct where the sole purpose of the inquiry is to deter that conduct and where the conduct is legal and may not be constitutionally declared illegal.

4. May a witness charged with contempt, in order to prove that Congress has transgressed the limit of its powers, resort to evidence outside the official records of Congress?

5. If a Congressional Committee uses its investigatory powers to further ends which Congress cannot constitutionally achieve by legislation, such as interference with freedom of expression, may the courts lend their aid to such an abuse of power?

These important questions are not answered in the existing decisions of this Court. We believe that they are not satisfactorily answered in the decisions below in these cases or the earlier decisions of the Court of Appeals for the District of Columbia dealing with contempt of Congressional Committees.

To an increasing extent in recent years, Congressional Committees have investigated, publicized, and issued official pronouncements upon the political activities of some of our citizens. The extensive discussion of this development in the daily press, in journals of opinion, and in legal periodicals, reveals a widespread fear that our political liberties are endangered. We believe that that fear will prove unjustified and that the process of Congressional investigation will prove fruitful if it is kept within reasonable limitations. If, on the other hand, Congressional Committees are in effect freed of the Constitutional limitations which restrict the substantive acts of all legislatures, the danger of repression will become very real.

For the reasons stated above, we respectfully submit that the petitions for writs of certiorari in these cases should be granted.

AMERICAN JEWISH CONGRESS,
Amicus Curiae, by
WILL MASLOW, Attorney.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Amicus Curiae, by
THURGOOD MARSHALL, Attorney.

SHAD POLIER,
JOSEPH B. ROBISON,
of Counsel.

October 19, 1949.

FILE COPY
IN THE

FILED
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Supreme Court of the United States

October Term, 1949

No. 248

JOHN HOWARD LAWSON

vs.

THE UNITED STATES OF AMERICA

No. 249

DALTON TRUMBO

vs.

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No. 766

EDWARD K. BARSKY, ET AL

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vs.

THE UNITED STATES OF AMERICA

No. 236

RICHARD MORFORD

vs.

THE UNITED STATES OF AMERICA

No. 49

HELEN PARKER, ET AL,

vs.

COUNTY OF LOS ANGELES, ET AL

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, The National Council of the Arts, Sciences and Professions, prays leave of this Court to file this Brief Amicus Curiae in the above-entitled case.

Petitioner organization deems it imperative in the interest of the preservation of liberty and democracy in the nation that this Court grant certiorari in the cases here and resolve the grave questions of constitutional law presented, particularly those touching freedom of speech, press, thought, association and assembly. Petitioner organization is deeply and vitally interested in those issues of law and the preservation of those liberties.

The National Council of the Arts, Sciences and Professions is an organization composed of artists, writers, musicians, actors, scientists, teachers, lawyers, doctors, architects and other American professionals. The National Council of the Arts, Sciences and Professions is committed to a program of peaceful development of the world's resources for the greater happiness of all mankind regardless of race, religion or political beliefs. Believing that the issues involved in the present case vitally affect the realization of that program and the welfare of all Americans, it respectfully requests leave to file the following brief amicus curiae.

In form, these cases concern no more than the individual fate of outstanding figures in American cultural and professional life. In substance, however, they involve the very fabric of our constitutional democracy.

The essential design of that fabric is the principle of popular sovereignty, of government only by the consent of the gov-

erned. Its warp and woof is the doctrine that the will of the people themselves is primary to the aims and policies of any group of public officials. And the realization of that principle, the implementation of the primacy of popular will over governmental authority, depends upon the impotence of such authority to mold that will. "Authority here," said Mr. Justice Jackson (writing for this Court in *Board of Education v. Barnette*, 319 U.S. 624, 641) "is to be controlled by public opinion, not public opinion by authority."

Public opinion, popular will, is determined by what people hear, read and see, by the manner in which they interpret their own experiences and what they can learn of the experiences of others, by the interchange of ideas, by analysis, argument and agitation. Were the government empowered to affect the course of that determination—by granting official favor to one set of ideas, as against another, by obstructing the expression of one point of view and facilitating the expression of others, by harassing and suppressing those with whom it disagreed—it could in essence fix the ultimate determination itself. Given the power to influence and direct thought and expression, government could reverse the maxim enunciated by Justice Jackson, could control public opinion instead of being controlled by it, could endow itself with the substance of despotic power. For then would the wielders of governmental authority be responsible in fact to themselves alone; by enslaving the popular will, they could usurp the popular sovereignty, and become, not the servants but the masters of the people.

Those who fought a bitter, bloody struggle to gain their freedom and independence sought a safeguard against making such a mockery of their sacrifice. They were wary of the temptations of governmental power. They were determined to prevent so easy a subversion of the democratic institutions they were establishing in the Constitution. Accordingly, they insisted upon the incorporation in that document of a specific prohibition against the invasion by government of the area of thought and expression. They sought, by the agency of the First Amendment, to guarantee the inviolability of the mind and will

of every person against governmental intervention in any form.

The First Amendment is thus the very foundation of our republican form of government. It is the "matrix, the indispensable condition" of all other liberties, of every institution of our democracy.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*Board of Education v. Barnette*, supra at p. 642.)

But the present cases confront us with nothing less than an effort to eclipse that star. Here we have a statute which purports by its terms to endow a group of public officials—a Committee of Congress—with the power to prescribe what shall be orthodox in matters of public and private life and opinion. Here we have the spectacle of a group of public officials acting under that statute proclaiming its peculiar definitions of heresy in economic, social and political doctrine, bestowing its favor upon the individuals and groups which meet its standards of propriety, thundering its condemnation of those with whom it disagrees, and requiring citizens either to avow the orthodoxy or to confess the heresy the Committee has defined.

To be sure the statute and its creature do not use the terms "orthodoxy" or "heresy"; their characterizations are framed in terms of "loyal" and "subversive," "American" and "Un-American." They do not refer to "social, political and economic doctrine"; the term "propaganda" serves as a substitute. But the meaning and the content is the same. What we have is a group of officials who presume to announce what is right or wrong, acceptable or unacceptable, for Americans to think and write and say. With Congressional approval, they have set themselves up as the definitive interpreters of good and bad American thought. They have assumed the prerogative of applying the seal of official approval to the tenets of certain indi-

viduals and groups, and to brand others with the stigma of "subversive." Is this not the official prescription of "orthodoxy"? Surely, the one fixed star in our constitutional constellation does not fade before an artful epithet.

Upon what basis can such a body, acting in such flagrant violation of the constitutional precepts announced by this Court be permitted to exist? This Court has said that "no official, high or petty can *prescribe* what shall be orthodox." (Emphasis added). Congress may not punish heresy or "Un-Americanism," for the simple reason that it lacks the power to prescribe that which is sought to be punished. It is the prescription to which this Court referred, and the lack of power to punish is but a corollary to the lack of power to prescribe.

Moreover, the First Amendment provides broadly that Congress shall make *no law abridging* freedom of thought or expression. It does not confine its prescription to abridgments enforced by fine or imprisonment or injunction. It does not wilt in the face of other repressive devices. This Court has said many times that the Constitution was designed to keep abreast of the times with due regard to the incursions of despotism.

And in our time, the most devastating of such incursions was accomplished to a large extent by the very technique with which we are concerned. In the Nazi system of repression, the Ministry of Information and Propaganda under Herr Goebbels had a peculiar and vital place. Its function was not to punish. It confined itself to declaring publicly what was "Aryan" or "Un-Aryan," good or bad for a German to say, to read, to see. It defined those writings and speeches and persons and organizations which were acceptable to government and those which were taboo. And it relied upon other public and private agencies to impose the sanctions for its "informational" edicts. Those whom it condemned could expect to be discharged from their jobs, ostracized from social intercourse, subjected to humiliation and violent assault, to prosecution for any conceivable technical offenses. But the Ministry itself was in the clear—its function was simply to "expose" and to "inform."

Is that not precisely the function of the Committee with which we are here concerned? It too publishes its taboos and relies on other agencies for the imposition of sanctions. Those whom it finds objectionable are publicly vilified, slandered and harassed. Individuals who associate themselves with persons or organizations characterized by the Committee as "Un-American" become the objects of suspicion, of official and unofficial investigation, find themselves deprived of the opportunity for public and private employment, hindered in the pursuit of every normal channel for the fulfillment of their lives. It is indeed the aim of the Committee to destroy organizations with whose purposes the Committee disagrees, (such as the undersigned in whose behalf this brief is filed) by making persons fearful of participating in its efforts.

But the effect of the Committee's acts is nowhere more vividly portrayed than in the very facts of the instant cases. Here are individuals who are among the foremost American artists and professionals, with records of a magnificent contribution to our national cultural and professional life, who have been deprived of their jobs, blacklisted, denied the opportunity to work in the arts and professions in which they have demonstrated so extraordinary a genius. Is this not "abridgment" of free thought and expression? Is this not punishment in its cruelest form—all the more unconscionable because it has been administered without any of the safeguards of due process which must, under our system of justice, attend the official deprivation of liberty or property.

But beyond this, these defendants have in fact been sentenced to fine and imprisonment. It is that sentence which this Court is asked to review. And it flows directly from the exercise by the Committee of the powers prohibited to it by the Constitution. These defendants were tried and convicted because they refused to submit to coercive inquisition into their personal and organizational beliefs and political associations. Their conviction, therefore, rests squarely upon the Committee's invasion of the area of free thought and expression. It is based entirely upon the Committee's action in setting standards of orthodox

political thought and association and presuming to determine whether particular individuals meet the standard thus declared.

There is no room for subtlety here. Stripped of nice technicalities, we are presented with a crude effort on the part of an agency of government to cast public opinion in the narrow mold that agency has itself prepared. We are faced with the exercise by a group of public officials of a prerogative never before assumed in our entire history—that of formulating for every American standards of thought and expression and association, and of compelling conformity to those standards under pain of penalties. We are confronted by a group of men who propose to foist upon us an iron-clad censorship of every organ of cultural and political expression. We are faced with the persecution of individuals who courageously challenge the power of any official to compel their acceptance of these standards of thought, who refused to submit to an inquisition in those spheres wherein the Constitution grants them immunity from government intrusion.

The action taken against the defendants herein carries with it a grave threat to the foundations of democracy. Like oaks from acorns, fuehrers from petty tyrants grow. We cannot compromise with despotism; it must be resisted wherever it dares to appear.

If our constitutional liberties are to retain the life and vitality with which they were originally invested, these monstrous convictions must be set aside.

Coupled with the foregoing, the decision of the Lower Court in the case of *Parker et al v. County of Los Angeles* must be reversed for the following reasons. The test oath has long been recognized as the heart of the inquisitorial process and the Constitution has made provision to eliminate this evil. *U.S. Const., Art. VI.*

Whether of religious or political nature, the test oath has been the weapon of tyranny wherever it existed and the antithesis of due process, and has been stricken down by the Supreme Court in all its ramifications. The test oath, prescribed by the Courts of the Inquisition and Star Chamber, was never

intended to be incorporated into our judicial or administrative systems, and, until recent years, was not utilized by any agency of government.

It is easy to understand the natural repugnance these methods call forth. When the test oath is employed, the presumption of innocence vanishes and the privilege against self-incrimination becomes a double-edged sword held over the head of the defenseless witness or employee. Our system is accusatorial rather than inquisitorial in nature, and the Supreme Court has held that the inquisitorial process substitutes "for the established mode of investigating . . . one that is unknown to the Constitution and repugnant to the genius of our law." *Cummings v. Missouri*, 71 U.S. 277, 322.

LESTER M. LEVIN
Counsel

Service of the within and receipt of a copy thereof is hereby admitted this.....day of....., A. D. 1949.

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OCT 7 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 248

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 249

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE AND BRIEF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Conference of Studio Unions, Los Angeles, Calif.; UOPWA Executive Board, Los Angeles, Calif.; Independent Progressive Party, Altadena, Calif.; United Electrical, Radio and Machine Workers of Am., Local 1421, Los Angeles, Calif.; Congress of American Women, Los Angeles Chapter, Los Angeles, Calif.; Hollywood Women's Coun-

cil, Los Angeles, Calif.; Southern California U.E. Conference, Los Angeles, Calif.; UOPWA Local 9, Los Angeles, Calif.; California Labor School, Los Angeles, Calif.; L. A. County Negro Democratic Club, Los Angeles, Calif.; Slavic Council of Southern California, Los Angeles, Calif.; Carpenters Local No. 634, AFL, Los Angeles, Calif., pray leave of this Court to file this Brief Amici Curiae in the above-entitled case.

Petitioner organizations deem it imperative in the interest of the preservation of liberty and democracy in the nation that this Court grant certiorari in the cases here and resolve the grave questions of constitutional law presented, particularly those touching freedom of speech, press, thought, association and assembly. Petitioner organizations are deeply and vitally interested in those issues of law and the preservation of those liberties.

Petitioner organizations are voluntary trade unions and voluntary social and political organizations representing many thousands of Americans.

As the public records of the Committee reveal and as the trial records in the cases herein confirm, the House Un-American Activities Committee has long pretended the power to police the thought of all organizations and individuals with which its members disagree. It has characterized as "subversive" all ideas distasteful to it and has undertaken to silence and suppress such ideas by intimidating, maligning and persecuting the advocates thereof. Because of this, the cases here are not limited in significance to John Howard Lawson and Dalton Trumbo, nor even to the motion picture industry; they are of significance as well to the nation generally and to petitioner organizations particularly.

Censorship, like incurable cancer, cannot be stopped once it obtains a foothold. If John Howard Lawson and Dalton Trumbo may be punished by the Committee for entertaining "dangerous thoughts," next week or next month it may be the

turn of one or more of the individuals or organizations represented in the filing of this amici curiae brief. In the shadow of this threat, freedom of speech and thought are drained of life.

> ". . . The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."—*Thornhill v. Alabama*, 310 U.S. 88, 97.

WILLIAM L. STANDARD,
Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

JOHN HOWARD LAWSON
vs.
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EDWARD K. BARSKY, ET AL
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RICHARD MORFORD
vs.
THE UNITED STATES OF AMERICA — No. 236

HELEN PARKER, ET AL
vs.
COUNTY OF LOS ANGELES, ET AL — No. 49

MOTION FOR LEAVE TO FILE AND BRIEF OF THE PROGRESSIVE PARTY OF AMERICA AND THE AMERICAN LABOR PARTY OF THE STATE OF NEW YORK AS AMICI CURIAE ON PETITIONS FOR WRITS OF CERTIORARI

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IN THE

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE PROGRESSIVE PARTY OF AMERICA AND THE AMERICAN LABOR PARTY OF THE STATE OF NEW YORK AS AMICI CURIAE ON PETITIONS FOR WRITS OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES THEREOF:

Leave is respectfully requested to file the annexed brief Amici Curiae in the above cases because of the belief of the

applicants that a refusal of certiorari will not only work hardships upon the appellants by denying them proper consideration of serious constitutional questions, but will also embed in the tissue of our law the erroneous constitutional concepts of the lower courts, which have sustained the severely repressive practices adopted by the legislative and executive arms of the Federal and many state governments. These cases, therefore, warrant the most serious attention of this Court. Their outcome will delimit the boundaries of the civil liberties of all Americans for many years to come. The applicants, therefore, present for the aid of the Court their considerations of one aspect of the basic constitutional question therein involved.

STATEMENT

The Progressive Party of America, is a national political party, founded July, 1948. It was born in the deep conviction that freedom and opportunity must be secured to all. It adopted the principle:

> ". . . that it is the first duty of government to secure for all people, regardless of race, creed, color, sex, national background, political belief, or station in life, the inalienable rights proclaimed in the Declaration of Independence and guaranteed by the Bill of Rights." (*Platform of the Progressive Party*, as adopted at the Founding Convention, Philadelphia, July 23-25, 1948).

Its platform incorporated the view that the struggle for the constitutional right of all political groups to express their views is the first line of defense of the liberties of a democratic people. It condemned the obtaining practice, under cover of law or otherwise, to suppress political dissent, and more particularly pointed to the activities of the House Committee on Un-American Activities and the "loyalty purge" programs of Federal and State governments as incursions on the constitutionally protected rights of freedom of opinion, expression, belief and association.

The American Labor Party of the State of New York is a

political party organized and existing in the said State for almost a decade and a half. Upon the constitution of the Progressive Party, it became its New York affiliate, retaining its original name, but ratifying and adopting the policies, principles and program of the national organization. In the last presidential election, the American Labor Party garnered over one-half million votes in New Yok State.

The five cases, herein, result from the activities of the said House Committee on Un-American Activities and the operation of a State "loyalty" program. Their history typifies a pattern of government action which has gripped the nation since the conclusion of World War II. The manner of their final determination will have far reaching effects in defining the rights and liberties of the American people. The deep concern of the Progressive and American Labor Parties for the maintenance and extension of the civil rights of the citizens of this country moves them to submit this brief amici curiae for the consideration of this Court.

ARGUMENT

The Constitution of the United States was fought for, conceived in, and ratified by, a generation of men, bred under the heel of a tyrant. Their memories bore the stamp of the coerced conformity and political repression of the Court of High Commission, the Star Chamber and the Royal legislatures—the earmarks of the retention of political power by the few over the many. They remembered, also, the Magna Carta and the Petition of Rights, and the bloody Revolutionary victory of the Colonies over the British Empire, hard-brought by the courage and fortitude of the people.

The authors of the Constitution, therefore, as Jefferson, identified "themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not th most wise, depository of the public interest." They wrote into that fundamental document the basic doctrine that the enlightened judgment of a free people should

be the law by which the nation should be governed. They bottomed our institutions on the thesis of "the authority of constitutions over governments, and of the sovereignty of people over constittuions." (James Madison in *Elliot's Debates on the Federal Constitution* (2nd Ed., 1836) Vol. IV, p. 550).

The century and a half of this nation's independent existence has seen many tests of the strength of these foundations of democratic government. The first challenge to the new Republic, soon after its institution, was thrown down by the Federalist party, the protagonist of the theory of government by superior classes, under the leadership of Alexander Hamilton ("The people Sir, is a beast"). Then in control of the government, the Federalists set about the establishment of their program: to overthrow the Republic and set up a dictatorship which would irrevocably concentrate all state power in the hands of the privileged class.

Recognizing that their program could succeed only through the concealment of their true purposes and the suppression of the people's opposition, they concentrated their attack against Jefferson and the newly organized Republican party, which he led. They whipped up a war fever against the revolutionary French government and coupled with this, unfounded assertions that France was spreading propaganda through paid agents (Cushman, R. E., *Alien and Sedition Acts in Encyclopedia of Social Sciences,* Vol. I, pp. 635-636), and that revolutionary doctrines were being spread by foreigners in the country (*Chaffee, Jr.* 2, *Freedom of Speech* (1920) p. 29). Jefferson, the Republicans, and all those who spoke out against the Federalist war program were branded as "Jacobins" and French agents.

Against this background of manufactured hysteria, they were able to ram through Congress four measures: three directed at aliens, and, one directed at both aliens and citizens, but all designed to stifle opposition to their program. These measures are now known as the Alien and Sedition Laws of 1798. The first three (1 Stat. 566; 1 Stat. 577; 1 Stat. 570) gave the President power over aliens he might judge "dangerous to the peace and

safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof." The fourth act (1 Stat. 596), the Sedition Act, made punishable all unlawful combinations which "oppose any measure or measures of the government" or "impede the operation of any law or the United States"; and "any false, scandalous and malicious writing or writings against the government * * *; or to excite against them * * * the hatred of the good people of the United States, or to stir up sedition * * *; or to aid, encourage or abet any hostile designs of any foreign nation against the United States * * * ."

The passage of the Sedition Law was the signal for the outbreak of a reign of terror. A rash of prosecutions were instituted under it against proprietors, editors and chief writers of the Republican press, and individuals who espoused the cause of Republicanism (Anderson, F. M., *The Enforcement of the Alien and Sedition Laws: American Historical Association, Annual Report* (1912). The first victim, a Republican editor, Matthew Lyon, was convicted for publishing a letter in which he described President Adam's "continual grasp for power . . . unbounded thirst for ridiculous pomp, foolish adulation and self avarice." His fellow editor and supporter, Anthony Haswell, was fined and imprisoned for castigating Lyon's jailer as "a hard-hearted savage who has to the disgrace of Federalism been elevated to a station where he can satiate his barbarity on the misery of his victims." James Callendar, of Richmond, was convicted for publishing in his book, "The Prospect Before Us," the criticism: "The Reign of Mr. Adams has been one continual tempest of malignant passions * * *. Take your choice between Adams, war and beggary, and Jefferson, peace and competency." David Browne, an itinerant preacher was similarly convicted of sedition for erecting on the common at Dedham, Massachusetts, a liberty pole bearing the inscription:

> "No stamp act. No sedition, no alien bills. No land tax. Downfall to the tyrants of America. Peace and retirement to the President. Long live the Vice President and the

minority. May moral virtue be the basis of civil government."

Thomas Jefferson and James Madison led the struggle against the Alien and Sedition Acts. The *Kentucky Resolutions* drawn by Jefferson warned that the enforcement of the measures "would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority." (*Elliot's Debates, supra.*, p. 544). The *Virginia Resolutions* drawn by Madison declared that the Acts exercise "a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deem the only effectual guardian of every other right." (*Elliot's Debates, supra.*, p. 554.)

Taking their cue from Jefferson, the people everywhere awoke and mobilized themselves. They gathered in town meetings, county conferences and conventions and expressed their opposition to the repressive laws in resolutions such as that adopted at Lexington, Kentucky:

> "Resolved that the Alien bill is unconstitutional, impolitic, unjust and a disgrace to the American name."

With the national election, the Federalists were swept out of power. The Republicans repealed the Acts; Jefferson pardoned its victims. He wrote, some time after he retired from public life (September 6, 1819) concerning this:

> "A legislature had passed the sedition law. The Federal Courts had subjected certain individuals to its penalties of fine and imprisonment. In coming into office, I released those individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the Constitution, and therefore null."

"The whole episode of the Alien and Sedition Acts burned itself indelibly into the American mind and tradition." (*Cushman, R. E., supra.*, p. 635). In *Abrams* v. *United States*, 250 U.S. 616 (1919), Mr. Justice Holmes stated (p. 630):

> "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditions libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed."

The People had won their first fight against the attempt to strangle American democracy by stifling the free communication of ideas through repressive government action. Yet, another attempt, cut in that pattern of 1798, has existed in the United States for a decade, intensified in the post-war years. The precise form is different, but the substance and effect are the same.

The House Committee on Un-American Activities in the course of so-called investigations, has set a norm and standard for "accepted" public opinion. "The Committee on Un-American Activities has seemingly been unwilling to tolerate those whose estimates of current problems do not match its own." Gelhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193. The acceptance of its ideas has been enforced by the labeling of non-conforming ideas as "subversive." During the course of its reign the Committee has condemned ideas of social and racial equality, H. R. 2, 76 Cong., 1st Sess. (1939); duty of government to support the people, *id.*; criticism of General MacArthur and Chiang Kai-Shek, H. R. 2233, 78 Cong., 2nd Sess.; attacks upon cartels and other industrial organizations, *id.*; America is a democracy, 79th Cong., 2nd Sess., Daily Appendix, 740; opposition to the Franco government of Spain, H. R. 2233, 79th Cong., 2nd Sess.; advocacy of a world state, *id.*; criticism of members of Congress, H. R. 2277, 77th Cong., 2nd Sess. It has labelled organizations and individuals as "subversive," whose principles embrace the non-conforming views.

The Committee enforces conformity by methods calculated

to frighten and demoralize vast segments of the population. ". . . exposure—it is the most effective weapon that we have in our possession." 83 Cong. Rec. 7570 (1938). ". . . Focus the spotlight of publicity upon their activities." H. R. Rep. No. 2, 76th Cong., 1st Secc. (1939) 13. ". . . by turning the light of pitiless publicity on the activities of organizations." *id.* et 24. "It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo," H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941), 23, 24. "This 'grand jury' will be in session to investigate Un-American Activities at all times." 81 Cong. Rec. 275. ". . . seek out and expose those activities which although legal are nonetheless Un-American, subversive and contrary to the American concept." 92 Cong. Rec. 5217.

Judge Edgerton, dissenting in *Barsky* v. *United States* 167 F. (2a) 241, 254, 255 (App. D. C. 1947), *cert. den.* 68 S. Ct. 155, *pet. for rehearing pending*, analyzed its methods as follows:

> "The investigation restricts the freedom of speech bq uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publiicty to its proceedings. This exposes the men an women whose views are advertised to risks of insult, ostracism and lasting loss of employment. Persons disposed to express unpopular views privately, or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.
>
> "The investigation also restricts freedom of speech by forcing people to express views. . . . Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous consequences."

The same standards adopted by the House Committee, serve as a foundation for "loyalty" investigations, oaths and inquiries.

Non-conformity in this area brings the serious penalty of loss of employment.

In these devious ways, then, the House Committee, and the agency of "loyalty" inquiries, are coercing conformity, complete and absolute, to a single standard of thought, and repressing, equally absolutely, every idea, person or organization which resists it, just as did the now infamous Alien and Sedition Acts.

Thus, the enabling resolutions, executive orders, and statutes which establish and create, and the inquiries and investigations which are conducted under the aegis of such laws by the Committee and by the agencies of government responsible for the execution of the "loyalty" programs, are violative of the Bill of Rights of the Constitution of the United States.

> "Our institutions were not devised to bring about uniformity of opinion; if they had been, we might well abandon hope. It is important to remember, as has been said, that the essential characteristic of true liberty is, that under its shelter many different types of life and character and opinion and belief can develop unmolested and unobstructed." (Charles Evans Hughes, Report of the American Bar Association, 1925, pp. 186-187).

The appellants, herein, have acted according to the precept of Thomas Jefferson who wrote in a letter to Benjamin Rush dated April 21, 1803:

> "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. It behooves him, too, in his own case to give no example of concession, betraying the common right of independent opinion, by answering questions of faith, which the law have left between God and himself."

Their prosecutions result from their resistance to unconstitutional invasions of the rights to freedom of speech, thought, advocacy and association. These infringements on fundamental liberties must be struck down in vindication of their rights as American citizens and in true respect for freedoms of all American citizens.

CONCLUSION

The Progressive Party and the American Labor Party, therefore, urge that this Court grant the Petitions for Certiorari herein, take jurisdiction of the cases and reverse the decisions below.

Dated: New York, New York
October, 1949

Respectfully submitted,

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MOTION FILED FEB 25 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 248

JOHN HOWARD LAWSON,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

No. 249

DALTON TRUMBO,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* SUBMITTED ON BEHALF OF PUBLISHERS, WRITERS AND PLAY PRODUCERS

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IN THE

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

Motion for Leave to File Brief as *Amici Curiae*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the publishers and writers of books and the producers and writers of plays listed in the accompanying brief, respectfully moves this Court for leave to file same as a brief *amici curiae.*

Motion for Leave to File Brief as Amici Curiae

The petitioners in these cases raise serious questions concerning censorship of the motion picture screen. Those on whose behalf this brief is filed, concerned with the integrity of other media of mass communication, believe themselves to have a special and professional interest in the issues here presented. The accompanying brief suggests that where the effect of a Congressional investigation is to restrain the free expression of ideas, as the Government here assumes the fact to be (Resp. Br., pp. 16-18), the courts, before lending their active support to the investigative process, have at least the responsibility of determining whether the investigation has the imposition of such restraints for its intended object as well as for its inescapable effect.

The consent of the respondent to the filing of this brief has been sought, but not obtained.

Dated: New York, N. Y.
February 24, 1950.

Signed: Osmond K. Fraenkel
Counsel for Amici Curiae

IN THE

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No. 248

JOHN HOWARD LAWSON,

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* SUBMITTED ON BEHALF OF PUBLISHERS, WRITERS AND PLAY PRODUCERS

This brief is offered on behalf of the publishers and writers of books and the producers and writers of plays listed below, who believe themselves to have a special and professional interest in issues which your petitioners, craftsmen in allied arts, now present to the Court for decision:

Publishers

Lee Barker
Douglas Black
George Braziller
Angus Cameron
Bennett Cerf
Jack Goodman
Robert Haas
Bert Hoffman
Storer Lunt
Mrs. Julian Messner
Stanley Salmon
James W. Sherman
Arthur Thornhill
Richard Walsh
Arthur Williams

Writers

Joseph Barnes
Jack Belden
Roger Butterfield
John Hersey
Richard Lauterbach
S. J. Perlman
William Shirer
Edgar Snow
James P. Warburg
Mitchell Wilson
Ira Wolfert

Playwrights and Theatrical Producers

Cheryl Crawford
Arthur Miller
Elmer Rice
Lee Sabinson
Irwin Shaw
Mrs. Robert Whitehead

The above believe that the kind of proceedings before the House Committee on Un-American Activities involved in these two cases effectively restrains, in ways both direct and indirect, the free creation and communication of ideas. Directly involved in this case is a threat to censor the content of motion pictures and to exercise controls over the employment of writers and artists in the motion picture industry which are unrelated to their creative work. Other forms of communication, including books and the stage, are threatened with similar interference from the same and like quarters. Those on whose behalf this brief is filed respectfully ask this Court to agree to consider now whether the motion picture screen, the theatre, the radio, our books and our public halls must constitutionally be left to suffer such intrusions.

The filing of this brief should not be taken to intimate support or sympathy with the political philosophies, whatever they may be, of the two petitioners before the Court. The decisions in question threaten the freedom of those of different as well as like mind. Your *amici* have firm faith that in the preservation of civil liberties lies the only guarantee that this country will never fall under a dictatorship of the right or the left, to both of which they are equally and irrevocably opposed.

The restraints upon freedom of expression involved in these cases are engineered by a simple circumlocution—those who desire to do what the Constitution forbids them to do by statute exploit the repressive possibilities of the technique of investigation so as to accomplish indirectly what they cannot do directly. This is not the first case in which this Court has had to look behind the disguise to find prohibited censorship. When Huey Long was warring with the newspapers, Louisiana imposed a gross receipts tax upon their revenues. The Court held the tax unconstitutional because

> "in the light of its history and its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

And when the Postmaster General, charged with the duty of issuing second class mail permits, claimed large discretionary power to withhold such permits on the ground that he was dispensing government subsidies, the Court denied him the power as involving "a radical departure from our traditions." *Hannegan* v. *Esquire*, 327 U. S. 146, 156.

Assuming that the power of the courts is to be invoked to compel witnesses subpoenaed before a Congressional committee to reveal the details of their private beliefs and so inhibit others in the free expression of their own, we

think the courts must accept the responsibility of deciding whether the Congressional committee is in fact acting beyond its powers and for an improper purpose. That the power to inquire is subject to abuses, dangerous to the civil and political rights of the people (even at the hands of legislative bodies) is, we think, a matter of history. It is also history that such abuses may perpetuate themselves by inhibiting opposition to the public officials guilty of the abuses. It remains for this Court to insure that the power of Congress to investigate, like the power to legislate, is kept within constitutional bounds, and not permitted to be used as the concealed weapon of censorship of the means of communication.

Respectfully submitted,

ZECHARIAH CHAFEE, JR.
Of the Rhode Island Bar

OSMOND K. FRAENKEL
ARTHUR GARFIELD HAYS
Of the New York Bar
Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.
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No. 248

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DALTON TRUMBO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF SOUTHLAND JEWISH ORGANIZATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

The Southland Jewish Organization was formed during World War II to safeguard the civic, political, economic and religious rights of Jews and other minority groups everywhere; to aid in creating an informed opin-

ion concerning Jewish interests and culture; to support the aspirations of the Jewish people throughout the world for a homeland, now realized in the establishment of the State of Israel, and the development of that Nation as a worthy member of the community of nations; to furnish material aid to the victims of racial and religious oppression and to assist in their care and rehabilitation; to create mutual understanding and respect among all persons and groups of different religious faiths; to participate appropriately in the affairs of democratic government; and to strive constantly for the maintenance of a just and equitable peace for all the peoples of the world.

We are dedicated both to the American ideals of freedom and to the Jewish tradition. We know the agony of meaningless wars, the dread of persecution, the blight of tyranny. The State of Israel itself stands as a symbol of the relentless struggle of mankind for freedom, the miracle of freedom "rising again to destroy its destroyer." Lerner, M., *Freedom: Image and Reality* in Safeguarding Civil Liberty Today, N. Y. 1945, p. 37. We are, therefore, opposed to the practices and programs of a police state because we recognize that liberty disappears when coercion, censorship and thought surveillance becomes official policies of government.

In the view of our organization, oppression can be fought not by adopting the methods of the police state, but by maintaining and extending the democratic process. Recognizing that universal freedom requires the largest

diversity of effort and purpose, the Southland Jewish organization functions through such committees as its legislative committees, concerned with legislation and legislative activities on all levels of government affecting the welfare and liberties of the people; through its Jewish Affairs committees concerned with the problems of the Jewish people and their relations to the State of Israel; through the Interfaith committees which foster a spirit of tolerance and understanding among members of all faiths; and its Educational committees which bring to its members through lectures, forums, and publications a knowledge of the events of the day and their significance.

We are submitting this motion to file brief *amicus curiae* because it appears to us that the issues which arise in the instant case have significance beyond the borders of the particular conflict. A decision that an individual's belief, opinion or association may be compelled by government and subjected to stigma and punishment appears to us to be a limitation on the practice of democracy. We are concerned with the danger of such a ruling to the entire community of free men. It is this concern which has impelled our appearance here.

Petitioners have consented to this motion. The consent of the government has been solicited but not yet received.

POINT I.

Government Surveillance and Control of Beliefs, Opinions and Associations Are Inconsistent With Our Democratic Traditions.

The road which the Jewish people travelled from Diaspora to Israel was marked with the blood of countless numbers of martyrs, victims of violence and terrorism unparalleled in the history of civilization. It should be borne in mind that this persecution came not only from petty vigilantes obsessed with the views of racial superiority, but more often was the result of Government action intended to cloak policies of self-interest with an official scapegoat. The Jewish people have learned to examine life in process, to observe events of the day, not statically, but in the historic stream of man's struggle for freedom and dignity. The forced disclosure of a person's beliefs, opinions and associations do not, therefore, appear to us as the mere aberration of the day. It is a portent of things to come and a reminder of the not too distant past.

For the aforesaid reasons, we believe it relevant to bring to the attention of this Court some of the methods by which Hitler and his followers seized and consolidated power in 1933. They will help to explain our concern with the issues which arise in this instant case. "In both nations (Italy and Germany) the Fascists succeeded to a certain extent in creating a category of second-class citizenship for anyone whom they chose to consider 'radical' and depriving him of equal rights before the law. In both nations, the liberals as a whole did not see clearly that once this category was created, they, too, could be pushed into it." Raushenbush, S., The March of Fascism,

New Haven 1939, p. 281. It is not our purpose to make invidious comparisons. We seek only to demonstrate that the democratic process may be swiftly eroded if those who cherish freedom are not eternally vigilant, and that freedom which is essentially indivisible cannot be attacked at one point without suffering injury at another.

The data which follows is from the official records prepared by the American and British prosecuting officials for presentation before the International Military Tribunal at Nuremberg, Germany (Nazi Conspiracy and Aggression, Government Printing Office, 1946, vols. I-VIII, Supp. A and B). We pass over, as beyond comment, the record of wanton destruction of life and property visited upon human beings because of their religious and political creeds. This perhaps may be noted: "The people killed by the Nazis belonged to various political parties and religious faiths, such as Democrats, Catholics, Communists, Jews and pacifists." *Op. cit.*, Vol. I, p. 240.

One of the first decrees issued by the Nazis was a registration measure, intended to identify subsequent victims and to keep them under constant surveillance and fear.

> "1. Jews who finished the sixth year of their age are prohibited to appear in public without a Jewish star.
>
> 2. The Jewish star consists of a 'Six Star' with black contours in the size of the palm of the hand of yellow material with the black inscription 'Jew.' It has to be worn on the left side of the chest of the clothing tightly sewed on."
>
> *Op. cit.*, Vol. V, p. 539.

In 1935, the first regulation issued under the Reich's Citizenship Law provided: "A Jew cannot be a citizen of the Reich. He has no right to vote in political affairs; he cannot occupy a public office." *Op. cit.*, Vol. IV, p. 9. The exercise of the franchise became a dead letter for other groups as well. Another decree provided: "The National Socialist German Worker's Party constitutes the only political party in Germany." *Op. cit.*, Vol. III, p. 962.

The civil service was reorganized with the issuance of a decree on April 7, 1933:

"Article 3.

Officials, who are of non-aryan descent, are to be retired—

* * * * * * * *

Article 4.

Officials, whose former political activity does not offer a guarantee that they at all times without reservation act in the interest of the national state can be dismissed from service."

Op. cit., Vol. III, p. 982.

A supplementary decree issued on July 20, 1933, provided:

"I. Officials, who have belonged to the Communist party or to auxiliary or collateral organizations, or otherwise have been active in furthering the aims of communism, are to be discharged.

II. Officials, who in the future are active for Marxism (Communism or Social Democracy) are to be discharged."

Op. cit., Vol. III, p. 987.

In the drive to crush all opposition, "hostile criticism, indeed criticism of any kind, was forbidden, and the severest penalties were imposed on those who indulged in it. Independent judgment, based on freedom of thought, was rendered quite impossible." Nuremberg Opinion and Judgment, *Op. cit.*, p. 12. The legislative and judicial powers of the German Reich were systematically employed to terrorize all political opponents. The Nazis enacted a law which made it a crime deliberately to make false statements calculated to injure the prestige of the Reich. The law also applies to statements which were not made in public, provided the offender counted on his statements being eventually circulated in public. *Op. cit.*, Vol. I, p. 242. On April 24, 1934, it was made a treasonable act punishable by death to create or organize a political party, or to continue an existing one. Moreover, a new concept of penal law was introduced. Any act injurious to the political interests of the State could be punished even if no existing statute forbade it. *Op. cit.*, Vol. I, p. 243.

A vast system of espionage into the daily lives of all parts of the population was instituted. In February, 1933, a decree provided that violations of privacy of postal, telegraphic, and telephonic communications were permissible beyond legal limitations. "Subsequently, the system of spying upon and supervising the political opinions of each citizen which permeated the entire people and private life of Germany, was, of course, also extended to judges." *Op. cit.*, Vol. I, p. 244.

At the same time, independent labor unions were destroyed; all union funds and property were confiscated, and trade union leaders sent to prison or death. In 1936, Robert Ley, the Nazi director of the German Labor Front,

was able to report: "National Socialism has conquered the factories. Factory Troops are the National Socialist shock troops within the factory, and their motto is: the Fuehrer is always right." *Op. cit.*, Vol. I, p. 258.

The drive for complete ideological conformity flowed over into the area of religious belief. The influence of the churches over the people of Germany was constantly subverted. Religious publications were suppressed. Severe acts of repression were visited upon the Catholic Church. The Jews were systematically eradicted. *Op. cit.*, Vol. I, pp. 296-306.

The educational system was reshaped. As Hitler stated in Mein Kampf: "On this whole basis the whole education by the National State must aim primarily not at the stuffing with mere knowledge, but at the building up of bodies which are physically healthy to the core. The development of intellectual faculties comes only after this." All teachers were required to take an oath of loyalty and obedience to Hitler. *Op. cit.*, Vol. I, p. 314. At the same time, all organs of propaganda (press, radio, films) and other cultural activities were made subject to the supervision and censorship of the Party Propaganda Department headed by Goebbels. The task of the Reich Chamber of Literature was to protect writers "from undesirable elements" and to keep out of the book market everything "un-German." *Op. cit.*, Vol. I, p. 338. The function of the Reich Film Chamber was to lift the film industry "out of the sphere of liberal economic thoughts" and to "receive those tasks which it has to fulfill in the National Socialist State." *Op. cit.*, Vol. I, p. 338.

This, in summary, is the tragic story of the destruction of civil liberty which sealed the fate of German democracy. The rule of law was replaced by the rule of

the lash and the concentration camp. Undoubtedly more than one lesson can be learned from this dark period in civilization's history. This, at least, we believe can be stated here: To avoid such ends, we must halt all beginnings. A single precedent may set loose a chain of reactions which can place permanent restrictions upon liberty. Civil liberties must be preserved, not merely in order to protect the individual citizen from brutal and unjust treatment, but in order that American democracy itself may be kept alive. If we lose our basic loyalty to the principles of freedom of thought, of speech, press and association, if those in office may not be publicly opposed or criticized, if those who discuss changes in our institutions are to be treated as dangerous and subversive criminals, then history—a very tragic history—may well repeat itself.

This Court has itself observed that the struggle to coerce uniformity of opinion is contrary to our basic democratic tenets. In the flag salute case (*West Virginia State Board of Education v. Barnette,* 319 U. S. 624), Mr. Justice Jackson, writing for the majority, stated (p. 641):

> "Those who begin coercive elimination of dissent soon find themselves eliminating the dissenters. Compulsory unification of opinion achieves only the uniformity of the graveyard.
>
> * * * * * * * *
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*Id.,* p. 642.)

Conclusion.

The Southland Jewish Organization respectfully urges upon this Court a determination of the issues herein which will reinvigorate the democratic process. A decision by this Court that compulsory disclosure and censorship of belief, opinion and association are contrary to the fundamental law will go far in maintaining the civil liberties of minority groups throughout the nation. Indeed, such a decision will have deep meaning for minorities and majorities alike, for all of us have a common stake in human decency and the brotherhood of man.

Respectfully submitted,

SOUTHLAND JEWISH ORGANIZATION,

By A. L. WIRIN,

Their Attorney.

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1 Encyclopedia of the Social Sciences, p. 635, Note 1, Cushman, R. E., Alien and Sedition Acts 3

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DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Motion by Certain Members of the Los Angeles Democratic County and State Committee for Leave to File Brief Amici Curiae in Support of Petition for Rehearing.

The undersigned are members of the Los Angeles Democratic County and or State Committee of the State of California. As members of a political party, we are concerned with any abridgements of the right of citizens to exercise the franchise or to belong to political parties of their own choosing. The issue raised in this proceeding concerning the power of a Congressional Committee to compel under oath the disclosure of an individual's political association appears to us to have broader implications than the case itself. For this reason, we are making

this motion for leave to file a brief *amici curiae* in support of the petition for rehearing. We urge this Court respectfully to delimit for the benefit of the country the scope of governmental power and the citizen's liberties.

Consent to the filing of the brief has been given by the attorney for the petitioners. Consent has been refused by the attorneys for the respondent. The questions of law which we desire to present to this Court are relevant to the disposition of the case, and because of the import of the case on the rights of all political parties and their membership, it may be that these questions of law will not adequately be presented by the parties herein. We summarize these questions in the ensuing discussion.

As this Court has indicated on numerous occasions, the right to form and join political parties is a right secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, press and conscience. These freedoms, although embodied in the First Amendment to the Constitution, have required vigilant protection by the courts and the people against those who would trample upon them.

The passage of the Alien and Sedition Acts of 1798 (only seven years after the adoption of the Bill of Rights) by a government then in control of the Federalist Party brought a crisis into the affairs of the nation which was not resolved until the defeat of that party in 1800. It is fair to say that the American Revolution was not completed until the repeal of the Alien and Sedition Acts during the presidency of Thomas Jefferson.

The laws were directed against members of an opposition political party. The Republican press, edited in many cases by Americans of foreign birth, was vigorous in its denunciation of the government and its officials. In 1797

and 1798, largely as a result of the XYZ incident, members of the Federalist Party were clamoring for war with France. The Federalists maintained that the French Government was spreading propaganda in America through paid agents (Cushman, R. E., "Alien and Sedition Acts" in Encyclopedia of the Social Sciences, vol. 1, p. 635, note 1); that revolutionary doctrines were being spread by foreigners (Chafee, Z., Freedom of Speech, 1920, p. 29); and that action was necessary if the country was to avoid "the spectacle of the disastrous operation of those doctrines abroad" (Chafee, Z., *supra*, p. 29, note 11).

To meet this apparent crisis, the Alien and Sedition Acts were passed. The first prosecution under the Sedition Act was against a Republican member of Congress running for reelection and all subsequent victims were Republicans. All individuals who espoused the cause of Republicanism were vigorously prosecuted (Anderson, F. M., The Enforcement of the Alien and Sedition Laws in American Historical Association, Annual Reports, 1912).

Jefferson and Madison led the people in their struggle against the Alien and Sedition Acts. Together they planned the introduction of resolutions in the Kentucky and Virginia legislatures. These were the famous Kentucky and Virginia Resolutions. We quote here one excerpt from Madison's report in the Virginia Resolution because it applied so appropriately to the issues involved in this proceeding:

> "Let it be recollected, lastly, that the Right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this Right, depends on the Knowledge of the comparative merits and demerits of the candidates for public trust; and

on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen that a number of important elections will take place while the act is in force. Should these happen, then, as is extremely probable in relation to some one or other of the branches of government, to be competition between those who are, and those who are not members of the government, what will be the situation of the competitors? Not equal; because the characters of the former will be covered by the 'Sedition Act' from animadversions exposing them to disrepute amongst the people; whilst the latter may be exposed to the contempt and hatred of the people, without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain. And from both these situations will not those in power derive an undue advantage for continuing themselves in it; which by impairing the Right of election; endangers the blessings of the government founded on it."

Elliot's Debates, Vol. IV, p. 276.

The whole episode of the Alien and Sedition Acts burned itself indelibly into the American mind and tradition. This Court has constantly held that the right to talk politics, to think politics, and to join political parties is absolutely free from governmental abridgement, direct or indirect. It has held that it is imperative "to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

Therein lies the security of the Republic, the very foundation of constitutional government" (*De Jonge v. Oregon*, 299 U. S. 353, 365).

For the aforesaid reasons we respectfully urge that this motion be granted, and that upon rehearing a decision be rendered which will advise the people that their right to belong to political parties is entirely free from governmental intrusion.

Respectfully submitted,

Signed

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John Clewe—65th Assembly District, Calif.
Ann Corner—59th Assembly District, Calif.
John Daugherty—61st Assembly District, Calif.
Fred Gable—45th Assembly District, Calif.
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Kay N. Kelleher—61st Assembly District, Calif.
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Robert S. Morris—47th Assembly District, Calif.
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A. L. WIRIN,
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IN THE

Supreme Court of the United States

October Term, 1949.
Nos. 248 and 249.

No. 248

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 249

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Motion for Leave to File Brief Amici Curiae by 64 Ministers and Rabbis in Support of Petition for Rehearing.

The undersigned *amici* are ministers and rabbis who reside in Southern California. We are Christians and Jews, Negro and White, serving the spiritual interests of men and women in our communities and profoundly concerned with the preservation of their general liberties in practice as well as in theory. We are particularly our brother's keeper in the matter of freedom of individual

conscience, and any threat to it is a threat to all who believe, whatever their belief is.

Consent to the filing of this brief has been given by the attorney for the petitioners. Permission has been requested, but no reply has been received from the Solicitor General.

We have learned through the travail of centuries that the price of any liberty is always vigilance—a lesson to be well heeded in the modern world. The spiritual faith and strength of America lies not in the rejection of differences, it is a faith which would reconcile differences in unity by persuasion and reason alone. In every area of social life, economic, political, religious or educational, the choice is between the unlimited use of reason and suppression. The only effective recognition of the ultimate origin of life and law is the exaltation of the rights and liberties of men. This at least is the American spiritual heritage, and without it we are impoverished. Oppression in any form and from any source threatens this priceless heritage, and against such threats, we, who are religious men, stand on common ground.

We are concerned with the essential issue now before this Court for decision, and that is, the extent to which belief, opinion and association may be coerced by law. Important as this issue may be to the particular persons herein involved, it is clear that the principles which govern the determination of the question before this Court have universal significance, affecting as they do the mechanisms on which liberty depends. History teaches us—and nowhere is this more true than in the history of religious liberty—that the principles which underlie a free society must be learned anew in each generation. Even in a land where freedom is securely enthroned there may be threats

to new developments in the minds of men, who live in a world that is never static. A decision of this Court, the supreme interpreter of the fundamental law, is always a touchstone of state action and a test by which other liberties may be measured. For these reasons, this brief is submitted in the hope and desire that it may be helpful to the Court in the resolution of a crucial issue of transcendent importance.

The Coercion of Opinion Is a Mistake Because It Impairs the Integrity and Dignity of Human Personalities and Is Socially Harmful and Because It Is Contrary to Our Traditions of Civil and Religious Liberty.

In 1701, William Penn wrote: "I ever understood an impartial liberty of conscience to be the natural right of all men; and that he that had a religion without it, his religion was none of his own. For what is not the religion of a man's choice, is the religion of him that imposes it; so that liberty of conscience is the first step to have a religion." Quoted in Northcott, Cecil *Religious Liberty* (N. Y. 1949), page 14. In 1772, in a Report of the Committee of Correspondence to the Boston Town Meeting, it was stated: "Just and true liberty, equal and impartial liberty, in matters spiritual and temporal is a thing that all men are clearly entitled to by the eternal and immutable laws of God and nature, as well as by the law of nations and all well-grounded municipal laws, which must have their foundation in the former." Quoted in *Liberty Documents* published by National Conference of Jews and Christians, 1936, page 11. In 1789, George Washington wrote to the Religious Society called Quakers: "Government being, among other purposes, instituted to protect

the persons and consciences of men from oppression, it certainly is the duty of rulers not only to abstain from it themselves, but, according to their stations, to prevent it in others." *Liberty Documents, supra,* page 17.

The most important aspect of a free society is freedom of the mind, and those cognate freedoms of speech, press and association, without which belief and conscience are meaningless. "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological." Mill, John Stuart, *On Liberty* (London Ed. 1887), page 7. Men must be free to recount their experiences, not only for their own good but for the good of the community. The progress of mankind is dependent upon the totality of experience, and that experience must be unfettered in its opportunity of expression. The individual's interpretation of his own experience may be wholly true or wholly false; it may be partly true and partly false. Unless he is free to refine his own thinking with the thoughts of the members of the community, and they with him, there is no assurance that the ultimate truth will be reached. It is a truism that the heresy of yesterday is the orthodoxy of today. The suppression of opinion is therefore, in its ultimate sense an injury to society. It prevents men from seeking the truth, the indispensable condition of freedom as the Scriptures admonish.

When Jefferson wrote in his *Notes on Virginia* (1781) his philosophy of toleration, he expressed the universal sentiments of the day:

> "The legitimate powers of government extend to such acts only as are injurious to others, but it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.—Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. It may fix him obstinately in his errors, but will not cure them. Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only.—Subject opinion to coercion; whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature.—What has been the effect of coercion? To make one half of the world fools and the other half hypocrites. To support roguery and error all over the earth.—Reason and persuasion are the only practical instruments. To make way for these, free inquiry must be indulged; and how can we wish others to indulge it while we refuse it ourselves?"
>
> Hirst, Francis W., *Life and Letters of Thomas Jefferson,* London, p. 136.

It is important to observe that this philosophy was embodied into law by the enactment of the Virginia Statute for Religious Freedom on January 16, 1786, a statute

which was, as this Court has noted (*Reynolds v. United States,* 18 U. S. 145), the precursor of the First Amendment to the Constitution. We quote portions of the preamble here because of their relevance and as a striking example of our tradition and heritage:

> "Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested His supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend its influence on reason alone;—that the opinions of men are not the object of civil government; nor under its jurisdiction; —that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order;—
>
> HIRST, FRANCIS W., *supra,* p. 138.

One more historic document must be mentioned. The Declaration of Independence is more than a charter of liberty. It embodies within it the influence of social, political and economic beliefs distilled from the historic struggles of mankind to free itself from the hand of

tyranny. "From Independence Hall in Philadelphia sounded a Jewish message which became the call of the Republic, 'Proclaim liberty unto all the inhabitants of the land.' *All* people are created equal, the American revolutionaries said, because all men are endowed by their Creator with the unalienable rights to life, liberty and the pursuit of happiness." Clinchy, Everett Ross, the *Right to the Different,* in Religion and Our Racial Tensions, 1945, page 29. Thus on this Judaeo-Christian base, was laid the foundations of American democracy, the idea of unity in diversity, the tradition of freedom, regardless of race, creed, opinion or belief.

This Court has recognized the importance to America of freedom of opinion and belief in the light of our history and traditions. In 1940, Mr. Justice Roberts, speaking for a unanimous Court in *Cantwell v. Connecticut,* 310 U. S. 296, stated (310):

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in Church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Conclusion.

It is our constant boast that we are a nation of free men. The dignity of human beings, the brotherhood of man, is proclaimed by us as authoritative principles which guide our way of life. Race, creed, origin, religious opinions, political affiliations are irrelevancies in the area of freedom. Nevertheless while these principles are embodied in our Constitution and in our traditions, humility requires us to say that these principles are more often honored in their breach than in their observance. Persecution still exists because of differences in opinion, because of differences in birthplace, because of differences in the color of an individual's skin. It would be idle to deny it. We are engaged in an unceasing struggle to bring to fruition the basic assumptions of our society. That is why we urge upon this Court, most respectfully, a careful delineation in this case of the powers which belong to officialdom and the powers which reside in the people. We recognize the perplexities of the problem created in the conflict between authority and the individual. Nevertheless we are convinced that the solution of that age-old problem lies not in coercion enforced by law, but in persuasion enforced by reason. Therein lies the security of the Republic and our spiritual strength.

Respectfully submitted,

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The Reverend Ray Charles Jarman
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IN THE

Supreme Court of the United States

October Term, 1949
Nos. 248 and 249.

JOHN HOWARD LAWSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

DALTON TRUMBO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

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SUBJECT INDEX

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I.

Under the facts of these cases, the punishment of petitioners for contempt violates the privilege against self-incrimination guaranteed to them by the Fifth Amendment to the Constitution of the United States. The very recent decision of Alexander v. U. S. shows that the question of self-incrimination is a substantial ground for granting of the petitions available to petitioners and not previously presented..... 2

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III.

Petitioners are residents and electors of the State of California; by the laws of that State they are guaranteed the right to decline to state their political affiliation. The House Committee on Un-American Activities, as an agency of the Federal Government, acted in excess of the lawful bounds of its power when it attempted to coerce disclosure of political affiliation contrary to State law guaranteeing freedom from such disclosure. This is a substantive ground available to petitioners although not previously presented..... 20

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IV.

Five justices of this court in the last two years have recorded their views that the constitutional question presented in these proceedings is of general importance and should be settled by this court. Under the Constitution and the rules of this court, certiorari should be granted. Intervening circumstances since the filing of the petitions for writs of certiorari require a review of the constitutional question involved herein..... 23

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IN THE

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DALTON TRUMBO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners, John Howard Lawson and Dalton Trumbo, respectfully urge this Honorable Court to grant them a rehearing upon orders filed April 10, 1950, denying their petitions for writs of certiorari to the Court of Appeals for the District of Columbia.

I.

Under the Facts of These Cases, the Punishment of Petitioners for Contempt Violates the Privilege Against Self-incrimination Guaranteed to Them by the Fifth Amendment to the Constitution of the United States. The Very Recent Decision of Alexander v. U. S. Shows That the Question of Self-incrimination Is a Substantial Ground for Granting of the Petitions Available to Petitioners and Not Previously Presented.

On February 4, 1950, contempt convictions were reversed by the Court of Appeals for the Ninth Circuit in *Alexander v. United States,* 18 Law Week 2373, ... F. 2d ....., on the grounds that the privilege against self-incrimination applied. The defendants there had refused to answer questions before a grand jury as to membership and organizational set up of the Communist Party. Upon the facts of petitioners' cases, a similar holding here is imperative as a matter of law.

Petitioners do not concede that prosecution because of advocacy or association is permissible under any law, within constitutional limitations. They assert the contrary. But the privilege against self-incrimination is designed to protect individuals against being forced to aid in their own prosecution, regardless of whether a valid conviction can be obtained. (*Hale v. Henkel,* 201 U. S. 43, 66.) In fact, the privilege serves its highest and historic purpose when it throws its protective cloak around those threatened with prosecution because of their beliefs or the expression thereof. (*Adamson v. California,* 332 U. S. 46, 88.)

The petitioners were called to the witness stand after the Committee had completed a full week of hearings (L. J. A.[1] 200-201; T. J. A. 417, 418.) During that week the Committee asserted and proceeded upon the proposition that the Communist Party advocates and plots to overthrow the Government of the United States by force and violence; the Committee took the position that the Communist Party is "pledged in word and deed to a foreign power," and that it is an illegal international political conspiracy (L. J. A. 239-42, 290-1, 295-6; Deft. Ex. 11, pp. 260, 547; T. J. A., Deft. Ex. 3, p. 647).

Petitioners offered to prove that a number of witnesses including the so-called "unfriendly ten" of whom petitioners were a part ,were called before the Committee because of what was stated by the Committee to be "the overwhelming evidence which was before the Committee that they were identified and active in a subversive and foreign conspiracy which goes under the misnomer of Communist Party of the United States"; that the Committee required the petitioners "to answer, if they could, the allegations which had been made against them"; and that the Committee members stated they were convinced that these witnesses refused to answer because they were Communists (L. J. A. 208-9, 263; Deft. Ex. No. 10, pp. 257, 480-1; 484-5; Deft. No. 11, pp. 260, 546-7; T. J. A. Deft. Ex. 3, p. 647). In this connection the Committee had, during the first week of hearings, put on testimony to the effect that petitioners were Communists (L. J. A. 224-8; T. J. A. 417-18, 492-3, 634).

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[1]In this petition for rehearing, the abbreviation "L. J. A." will be used for references to the Joint Appendix in petitioner Lawson's case, and "T. J. A." for the Joint Appendix in petitioner Trumbo's

Petitioners offered to prove that the Committee utilized the hearings for the object of "exposing" persons asserted by it to be Communists; that one of the objects of the Committee was to send persons to jail as a result of such exposure; that the Committee utilized its hearings to have penalties inflicted upon those "exposed"; and that one of the penalties sought to be imposed upon petitioners was their discharge and blacklisting from all employment in the motion picture industry (L. J. A. 258-61, 264-5, 314-15, 326, 339, 466-8; Deft. Ex. No. 10, pp. 257, 481-2, 513-26; T. J. A. 490, 622-29, 632).

In the *Trumbo* case the Committee had adduced evidence, prior to his taking the stand at the hearings, that petitioner was a member of the Screen Writer's Guild (T. J. A. 466-7, 625). It proceeded upon the theory that petitioner worked in the Screen Writers' Guild as a Communist and that the Guild was under the control of the Communist Party (T. J. A. 417-18, 462-3). Thus, the question regarding membership in the Guild falls into the same category as the one relating to membership in the Communist Party.

It therefore appears that at the very moment the Committee was insisting that petitioners answer the questions as to their alleged membership in the Communist Party, the Committee was asserting that such membership is a crime and further that petitioners were guilty of that asserted crime. It was demanding of petitioners that they confirm the Committee's contentions which, according to it, would establish petitioners' guilt of that crime.

The privilege against self-incrimination was designed to protect the people precisely in situations such as this—to prevent the use of governmental authority to compel

witnesses to testify against themselves, where they might be prosecuted because of their alleged beliefs or associations. In the case of *Adamson v. California, supra,* Mr. Justice Black recalled the trial of Mrs. Ann Hutchinson charged with holding unorthodox religious views and commented:

> "The lamentable experience of Mrs. Hutchinson and others contributed to the over-whelming sentiment that demanded adoption of the *Constitutional Bill of Rights.* The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves.*" (Emphasis supplied.) (Page 88.)

It has now been found that petitioners refused to answer those questions. Petitioner Lawson predicated that refusal upon "the rights and privileges and immunity of American citizens" and particularly his rights under the Bill of Rights (L. J. A. 195-7). Petitioner Trumbo pointed to the relationship between the question concerning membership in the Screen Writers Guild and the one relating to membership in the Communist Party, urged that the questions were unconstitutional and demanded that the Committee's claimed documentary evidence against him be produced before he be required to answer the questions (T. J. A. 384-390).

Although the privilege against self-incrimination may be waived, there is no evidence of any waiver in these cases. The privilege may be waived by an explicit dis-

avowal of any claim to it (*Re Chapman,* 166 U. S. 661, 666; *Sinclair v. United States,* 279 U. S. 263, 289; *United States v. Murdock,* 284 U. S. 141). There has been no such disclaimer here.

It may be waived by a voluntary partial disclosure in which event the privilege under certain circumstances may not stand as a bar to further disclosure (*Raffel v. United States,* 271 U. S. 494; *Johnson v. United States,* 318 U. S. 189). If there is a disclosure which is involuntary, the privilege is not waived although it was not invoked at all at the time the disclosure was made (*State v. Conway,* 348 Mo. 580, 154 S. W. 2d 128; *cf. Powers v. United States,* 223 U. S. 303). Here, there was no disclosure at all, voluntary or involuntary. A refusal to answer at all is certainly no more a waiver than an answer under compulsion but without any claim of the privilege.

Where there is an immunity act, it was formerly held that a witness not acting under direct compulsion, must specifically claim the privilege if, thereafter, he is to have the benefit of the immunity statute (*United States v. Skinner,* 218 Fed. 879, overruled by *United States v. Monia,* 317 U. S. 424, 433). Otherwise, the testimony was considered to have been given voluntarily rather than in exchange for any statutory immunity.

However, as to witnesses before Congressional committees there is no immunity statute adequate to meet the requirements of the Fifth Amendment (R. S. Sec. 859, June 22, 1938, Chap. 594, 52 Stat. 943; U. S. C. Title 18, Sec. 3486; *Counselman v. Hitchcock,* 142 U. S. 547; Ebeling, "Congressional Investigations, p. 339, N. Y. 1928). Nor are petitioners relying upon any immunity act. Rather they rely upon the privilege granted by the

Fifth Amendment with respect to questions they *did not* answer, and which privilege has not been waived.

It is true that throughout the decisions on the subject of the Fifth Amendment in cases in which the witness answered questions there is persistent language to the effect that the protection may be waived if the privilege is not urged. In those cases it is the giving of testimony without the claim of privilege which leads to the conclusion that the testimony was voluntarily given; it is the voluntary testimony which constitutes the waiver.

This Court has recently held that the waiver of Constitutional rights is not lightly to be inferred (*Smith v. United States,* 337 U. S. 137, 150). In no case has it ever been held that a witness who refused to answer an incriminating question waived anything. Waiver applies where a witness proceeds to testify in the absence of an appropriate claim of the privilege. A refusal to testify may be unjustified, but it is not a waiver.

Even in cases where the witness testified the courts have not held him to a strict accountability for the form in which he makes his claim of privilege. Witnesses have been excused for "inartificiality or inexactitude in making the claim of privilege" (*United States v. Eisele,* 52 Fed. Supp. 105), and for statements made while "nervous or excitable" (*United States v. St. Pierre,* 128 F. 2d 979, 980). Even where a witness in answering questions makes no claim of the privilege at all, but does not advisedly intend to waive the privilege, it has been held that there is no waiver (*United States v. Bell,* 81 Fed. 830). It is voluntary testimony rather than a failure to claim the privilege which constitutes a waiver thereof (*United States v. De Pietro,* 36 Fed. Supp. 389). The principle of

waiver by the giving of testimony was summarized by one court as follows:

> "The immunity guaranteed by the Fifth Amendment, being personal to the witness and for his sole benefit, is deemed to be waived unless invoked by *some manifestation of his unwillingness to testify* at the time his testimony is given." (Emphasis added.) (*United States v. Mary Helen Coal Corp.*, 24 Fed. Supp. 50, 51.)

Thus, it has been held that even though the privilege was not expressly claimed, its benefit was available to one who had refused to permit his shoes to be taken for the purpose of comparison with certain tracks (*Davis v. State*, 131 Ala. 10, 31 So. 569); and to one who refused to produce books (*Sprague v. State*, 203 Ind. 581, 181 N. E. 507). In the cited cases a refusal *alone* has been held sufficient to gain the protection of the privilege against self-incrimination. The same principle has been applied in cases involving compulsory physical examinations whether outside of court (*State v. Haight*, 117 *Iowa* 65, 91 N. W. 935; *People v. McCoy*, 45 How. Pr. (N. Y.) 216) or in court (*Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717; *cf. State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (affd. 164 U. S. 705)).

Moreover, in this case the petitioners have the same rights as defendants in criminal cases—for they were placed in that position by the Committee. That body charged that they had engaged in association declared by the Committee to be criminal; it stated that the purpose of the investigation was to expose the facts charged and to verify them through the mouths of the very persons

charged. Under such circumstances it matters not that the proceeding was not a criminal case but was a legislative investigation.

Where the investigating body or the party prosecuting the action charges that the witness is a criminal and asks him questions designed to establish this assertion, there is no need for any claim of the privilege beyond a mere refusal. Obviously the charging party cannot be heard to say that there is no danger of incrimination as its own charge reveals the danger. It has placed the witness in a position substantially identical to that of a defendant in a criminal case and he has an absolute right to refuse to answer.

Thus, where a state fire marshal conducted an investigation (not a criminal proceeding) in which he asserted that the witness had wilfully started a fire (arson), it was held that the privilege applied even though not claimed and the witness actually testified, because the witness was essentially in the same position as a defendant in a criminal case (*State of Minnesota v. Rixon,* 180 Minn. 573, 231 N. W. 217; see also, *State v. Sly,* 63 S. D. 162, 257 N. W. 113).

The same concept has been invoked in cases of bills of discovery in aid of actions at law or equity in which the plaintiff alleged facts which if true would establish the defendant's guilt of a crime. In such cases, it has been held that the bill of discovery is vulnerable to a demurrer or may be met by an answer in which it is pointed out that the questions call for answers which might incriminate—without any actual claim of the privilege on the part of the defendant (*United States v. Saline Bank,* 1 Pet. (26 U. S.) 100).

In such a case, *United States v. National Lead Co.*, 75 Fed. 94, the Court said:

> "Now the plaintiff alleges that the evidence of these unlawful acts is to be found in the books of the defendant, and for that reason asks for the order requiring their production. But because of that very reason the order asked for ought not to be granted."

See also:

Cartwright v. Green (1803), 8 Ves. Jr. 406, 32 Eng. Reprint 412;

Noyes v. Thorpe, 73 N. H. 481, 62 Atl. 787;

Marsh v. Marsh, 16 N. J. Eq. 391;

Black v. Black, 26 N. J. Eq. 431;

Adams v. Porter Cushing, 55 Mass. 170;

Mires v. Chrisman, 7 Monroe (46 Ky.) 422;

Northwestern Bank v. Nelson, 1 Gratton (42 Va.) 108.

It is also the rule that where a complaint in a civil case charges facts constituting a crime, the defendant may file an unverified answer without specifically claiming the privilege against self-incrimination and without giving reasons for so doing (*Sunley v. Badler*, 33 N. Y. S. 2d 642).

In such cases, inasmuch as the moving party relies on alleged facts which might subject the witness to prosecution on a criminal charge, the position of the witness is so akin to that of a defendant in a criminal case that the examination of the witness may not be pursued against

the will of the witness—even to the extent of requiring him to specifically claim his privilege (*Franks v. Reimer,* 9 N. Y. Supp. 273).

> "It seems to be well settled that in such an action (civil action alleging fraudulent conspiracy) an order for the examination of the party will be vacated when the object of it is to procure testimony to establish the fraud charged. This doctrine rests upon the provisions of the constitution of the state, which declares that no person shall be compelled, in any criminal case, to be a witness against himself." (*Andrews v. Prince,* 66 How. Pr. (N. Y.) 280.)

The rule that can be drawn from these authorities is that regardless of the character of the proceedings, if their purpose is to establish facts alleged or claimed by the investigatory body or moving party, which might subject the witness to a criminal prosecution, then as far as the Fifth Amendment is concerned the witness occupies the position of a defendant in a criminal case. He cannot be required to testify and the privilege automatically attaches when any attempt to compel him to admit claimed incriminatory facts is made. Under such circumstances, at the very least, the witness is free to refuse to answer and contempt proceedings may not be based on such refusal. This rule is as applicable to legislative investigations as to any other proceedings. In *Emery's* case (1871), 107 Mass. 72, the Court said:

> "The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a

committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature cannot, by the most formal and solemn enactments of law, authorize them to do it. If, then, the legislature cannot, by the formal enactment of all of its branches, subject a citizen to such compulsory disclosure, it is difficult to see on what ground of argument or inference, from necessity, propriety, or the nature of constitutional republican government, an authority can be deduced for either branch of the legislature to do so by its mere order."

The danger of prosecution of petitioners because of their alleged beliefs and association is beyond doubt. The Committee's position that the Communist Party is a criminal conspiracy advocating the overthrow of the government by force and violence and that petitioners were actively associated therewith, was tantamount to a charge that petitioners were guilty of a violation of the Smith Act, 18 U. S. C. 2385 (Act of June 28, 1940, ch. 439, title I, Secs. 2, 3, 5, 54 Stat. 670, 671). The very object of the proceedings was to establish such "guilt." Under such circumstances a witness need not answer questions relating to membership in the Communist Party (*Alexander v. United States, supra*). The very real danger of prosecution of alleged members of the Communist Party for violation of the Smith Act has now been demonstrated (*United States v. Foster* (S. D. N. Y.).

Moreover, the privilege against self-incrimination is available not only with respect to criminal cases but wherever the witness faces the threat of a penalty or forfeiture (*Boyd v. United States,* 116 U. S. 616; see also 29 Michigan L. Rev. 126, and cases therein cited). The privilege has been held applicable in the sustaining of a demurrer to a bill of discovery in a civil case in which the plaintiff relies upon allegations which might lead to the imposition of a penalty or forfeiture upon the defendant (*W. T. Raleigh Co. v. Hester,* 190 Miss. 329, 200 So. 250).

The loss of employment is a penalty or forfeiture within the meaning of the Fifth Amendment (*United States v. Lovett,* 328 U. S. 300).

Here the Committee used its investigation toward the end of "exposing" petitioners and thereby causing the forefeiture of the petitioners' jobs and contracts and the penalty of blacklist. The Committee called upon petitioners to give information upon which it expected to predicate this penalty and forfeiture. The privilege against self-incrimination was thereby invoked by the very asking of the questions.

The privilege being applicable petitioners may not, consistently with the Fifth Amendment, be punished for their refusal to answer.

II.

Morford v. U. S., No. 236, October Term 1949, Decided April 10, 1950, Requires the Reversal of the Conviction of Petitioner Lawson, Because the Trial Court Denied to Him Meaningful Opportunity to Prove the Actual Bias of the Government Employee Jurors as Well as the Opportunity Intelligently to Exercise Challenges for Cause and Peremptory Challenges. The Morford Decision Is an Intervening Circumstance of Controlling Effect.

Petitioner Lawson proposed some 17 questions on *voir dire* to prospective jurors which the trial court refused to allow. These questions are set out in Appendix 1 of the appendix. They were designed to test the existence of possible bias and prejudice, and to permit petitioner Lawson to exercise challenges intelligently, both for cause and peremptorily. Moreover the procedure established by the trial court for *voir dire* examination precluded fair opportunity for meaningful *voir dire* examination. Proposed jurors were not seated in the jury box when the *voir dire* questions as finally allowed by the Court, were put to them. Instead the panel was required, over petitioner's objection, to sit in the rear of the courtroom; between these talesmen and the defendant was a row of seats occupied by members of the press. (See Appendix 2 containing a fuller description of the actual trial scene.) Petitioner's request that the talesmen be seated in the jury box so that he might see them more readily and interrogate and study the character of their responses, was denied by the Court with the admonition:

> "The Court: Now, look. I am conducting this trial . . . I do not want any more reference to

that. I run this Court in the way I deem proper . . . I do not want any more reference to the Courtroom, the jurors or where the defendant sat." (L. J. A. 131.)

Efforts to examine the proposed jurors *individually* on the subject of their possible prejudice were cut off by the Court with the ruling:

> "The Court: Mr. Kenny, I do not like to interrupt but we have been all over this yesterday. The questions that you are now asking each individual juror are *identically the questions that you asked the panel yesterday,* and I think that the only purpose this morning is to select the jury, and you may exercise your challenges, unless there is something new has come up . . ." (Emphasis added.) (L. J. A. 159.)

This Court in *Morford v. U. S., supra,* said:

> "Preservation of the opportunity to prove actual bias is a guarantee of defendant's right to an impartial jury."

It is apparent that this qualification is the rationale for the majority position in the *Wood, Frazier* and *Dennis* cases. While rejecting the contention that government employment *per se* is a disqualifying factor, the majority softened the blow by reiterating adherence to what Chief Justice Hughes said in *Wood v. U. S.,* 299 U. S. 123, 134:

> "All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror although not exempted from service has any bias in fact which would prevent his serving as an impartial juror. In dealing with any employee of the government, the Court

would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matter involved in the prosecution, or otherwise, he had actual bias and if he had to disqualify him."

Impartiality is not a technical conception. It is a state of mind, elusively difficult to establish. For the ascertainment of this mental attitude of appropriate neutrality, the widest range of inquiry must be permitted. The absence of such necessary neutrality of a talesman cannot conceivably be established where strictures are imposed, as here, upon counsel who seek to establish existence of bias. The authorities uniformly so hold.

The exclusion on *voir dire* of proposed questions which were not qualitatively dissimilar from those here denied, led this Court through Chief Justice Hughes to reverse the conviction in *Aldridge v. U. S.*, 283 U. S. 308.

Here petitioners were entitled to know whether the charges made by the Committee against petitioner that he was a Communist and whether the very question asked by the Committee: "Are you now, or have you ever been, a member of the Communist Party?" and the petitioner's response thereto, would create an attitude or frame of mind on the part of the proposed jurors different from his attitude or frame of mind if a question involving religion as distinguished from political affiliation had been asked and the categoric response not given (rejected questions 21, 22, 23, and 25).

Rejected questions numbered 61, 64, 65, 66, 67, 68, 69, 77, 78, 79, 80 and 85, are also designed to ascertain the

frame of mind of the proposed jurors in matters which might affect their judgment in this case.

Question number 40 was designed to determine whether fear of criticism following a verdict for acquittal might have deterred the talesmen. This question was critically important.

It is true, of course, that there is no exact rule prescribing the questions which may be asked a prospective juror on his *voir dire* in order to determine his qualification but the question is left largely to the sound discretion of the Court in each particular case. In the exercise of that discretion, however, the trial court should adapt the questions to the needs of each case in the effort to secure an impartial jury (*Corens v. State,* 185 Md. 481, 45 A. 2d 340). And any circumstance which may reasonably be regarded as rendering a person subject to challenge may be made the subject of questioning and a challenge for cause. Moreover the range of inquiry should be broad enough to afford counsel all information necessary to most intelligently exercise his peremptory challenge. In other words, an examination of a prospective juror on his *voir dire* is proper as long as it is conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand *or any collateral matter reasonably liable to unduly influence him* (*Corens v. State, supra*).

In *People v. DeLordo,* 350 Ill. 148, 182 N. E. 726, the Court said:

> "A defendant has the right to examine prospective jurors to ascertain their occupation, habits and association so far as they might tend to influence them in exercising judgment in the case. He has also the right to make any reasonable and pertinent inquiries

> to ascertain whether the minds of the prospective jurors are free from bias or prejudice, *so as to enable him to exercise his right of peremptory challenge intelligently.* (*People v. Redala,* 300 Ill. 392.) While a trial judge has a discretion to limit the extent to which attorneys may go in their examination of jurors, he has no right to deny a defendant the right to make all such reasonable inquiries of a juror as may enable him to determine whether or not such juror will be free from bias and prejudice in exercising his judgment in the case and as will enable the defendant to exercise his right of peremptory challenge intelligently. The trial judge in this case unduly restricted the attorneys for the defendants in their examination of the jurors."

A defendant is entitled to be tried by an unprejudiced and legally qualified jury to which end *the range of inquiry in the endeavor to impanel the jury should be liberal.*

U. S. v. Darby, 139 F. 2d 7;

Olguin v. Thygesen, 47 N. Mex. 377, 143 P. 2d 585;

Fedorchik v. Stewart, 289 Mich. 436, 286 N. W. 673;

Kizer v. State, 67 Okla. C. R. 16, 93 P. 2d 58;

Murphy v. State, 72 Okla. C. R. 1, 112 P. 2d 438.

The examination of the talesmen *en masse* while in the rear of the courtroom aggravated the prejudicial error committed in limiting the scope of *voir dire.* The total effect of the trial court's procedure in the matter of the examination of jurors on *voir dire* was to effectively stifle any attempted detailed examination of the talesmen by counsel for the purpose of developing possible grounds for challenge for cause, and for the purpose of intelli-

gently exercising the three peremptory challenges, thus depriving appellant of the constitutionally guaranteed right of a trial by jury, including the right to a selection of a fair and impartial jury (*People v. Barrett,* 207 Cal. 47, 276 Pac. 1003).

This precise form of examination was scrutinized and condemned as lacking in essential fairness in *People v. Estorga,* 206 Cal. at pp. 84-85, 273 Pac. 575, in the following language:

> "The collective examination of the entire panel in the body of the courtroom, and by a series of questions which may, for the greater part, be answered by silence on the part of the jurors, and, under circumstances like those in the case at bar, in which neither the People nor the defense had any opportunity to observe the jurors as they answered, is, in our opinion, such a wide departure from the due course and conduct of an examination as to call for the disapproval of this court."

And in *People v. Riordan,* 79 Cal. App. 496, 250 Pac. 190, the Court there said that when the jurors are examined *en masse* there is a considerable likelihood of a juror not fully understanding the question and remaining silent, when, should he give an answer, it might show ground for challenge.

The proposed *voir dire* questions which the Court disallowed and the procedure which the Court employed in the selection of jurors, resulted in a denial to petitioner of a meaningful opportunity to select the trial jury and to exercise intelligently his challenges both for cause and peremptorily, and requires a reversal under the authority of *Morford v. U. S., supra,* and the other cases hereinbefore cited.

III.

Petitioners Are Residents and Electors of the State of California; by the Laws of That State They Are Guaranteed the Right to Decline to State Their Political Affiliation. The House Committee on Un-American Activities, as an Agency of the Federal Government, Acted in Excess of the Lawful Bounds of Its Power When It Attempted to Coerce Disclosure of Political Affiliation Contrary to State Law Guaranteeing Freedom From Such Disclosure. This Is a Substantive Ground Available to Petitioners Although Not Previously Presented.

Petitioners are residents and electors of the State of California. By the laws of that State a voter is guaranteed the right to decline to state his political affiliation (California Elections Code, Section 221). That statute was in effect in October, 1947, when petitioners were called upon to testify before the House Committee on Un-American Activities and when that Committee asked each petitioner the question: "Are you now or have you ever been a member of the Communist Party?"

The Communist Party is a lawful political party in the State of California and electors of that State are free to affiliate with it (*Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889). And in California persons desiring to affiliate with that Party may decline to state publicly whether they have or have not so affiliated (California Elections Code, Section 221).

California is free to conduct her elections and regulate her electorate as she may deem wise; only as her action may be affected by the prohibitions of the United States Constitution may there be Federal intercession (*Smith v.*

Allwright, 321 U. S. 654). Thus, because of the Fourteenth and Fifteenth Amendments the State cannot discriminate as between electors on the unreasonable ground of race or color; nor, because of the Nineteenth Amendment may the State abridge the right to vote on account of sex. But these salutary constitutional provisions do not support the thesis that control over elections or the rights and privileges of State electors have thereby been delegated to the Federal Government.

The Constitution of the United States gives Congress no power to prescribe the qualifications of electors in the States (29 C. J. S. 25; *Breedlove v. Suttles,* 302 U. S. 277). While the foregoing principle is admittedly subject to the exceptions noted above and to the further exception that the right to vote for members of Congress is based on the Federal Constitution (Const. Art. 2, par. 32), nevertheless the State of California has supreme and exclusive power to determine the class of inhabitants who may vote, and whether they may or may not be compelled to disclose political affiliation. Over this question neither the Congress as a whole, nor the House Committee as a part thereof, has any jurisdiction.

In the case of *Mugler v. Kansas,* Mr. Justice Harlan in delivering the opinion of the Supreme Court, quoted with approval the following language from Mr. Justice McLean's opinion in the License Cases:

> "Mr. Justice McLean, among other things, said:
>
> "'A state regulates its domestic commerce, contracts, the transmission of estates, real and personal and acts upon internal matters which relate to its moral and *political* welfare. Over those subjects the Federal government has no power. . . .'" (*Mugler v. Kansas,* 123 U. S. 562, 658.)

The exclusivity of the State's control over its electorate and the party affiliation of such electors springs from a recognition of the basic principle that:

> "The right of local self government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government." (*Britton v. Board of Commissioners,* 129 Cal. 337, 344, 61 Pac. 1115.)

The powers of the House Committee on Un-American Activities are assuredly not so unlimited as to permit it, even under the vague language of Section 121(b), Legislative Reorganization Act of 1946, to invade the area of political affairs and elector's affiliations exclusively reserved to the States under our system of government.

The right to be free to declare, or to decline to declare, political affiliation is no minor privilege. It is a part of the very process of forming, or not forming, as the electors choose, political parties:

> "No one can be so ignorant as not to appreciate the value, indeed, the necessity, of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution which seeks to give expression and effect to the wisest and best ideas of its members. No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrage of their fellows. Such a right is fundamental. It is inherent in the very form and

substance of our government, and needs no expression in its constitution." (*Britton v. Board of Commissioners, supra.*)

The House Committee acted in excess of the lawful bound of its power in demanding an answer to the question concerning petitioners' political affiliation and therefore each petitioner could rightfully have declined to answer that question (*Sinclair v. U. S.*, 279 U. S. 291—". . . a witness rightfully may refuse to answer where the bounds of the power are exceeded. . . .").

IV.

Five Justices of This Court in the Last Two Years Have Recorded Their Views That the Constitutional Question Presented in These Proceedings Is of General Importance and Should Be Settled by This Court. Under the Constitution and the Rules of This Court, Certiorari Should Be Granted. Intervening Circumstances Since the Filing of the Petitions for Writs of Certiorari Require a Review of the Constitutional Question Involved Herein.

This Court has recognized in the past the duty which the Constitution places upon it "to say where the individual's freedom ends and the State's power begins" (*Thomas v. Collins*, 323 U. S. 516, 529). In accordance with its constitutional obligation, the Rules of this Court provide in part that a writ of certiorari will generally be granted "where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or

statute, of the United States, which has not been, but should be, settled by this Court; or where that court has not given proper effect to an applicable decision of this court" (Rules of the Supreme Court, Rule 38, Ch. 4(c)).

The power of the House Committee on Un-American Activities under our constitutional system to compel the disclosure under oath of a citizen's private opinions, beliefs and associations is squarely presented in the proceedings herein. The failure of this Court to grant a writ of certiorari and settle this question of universal importance leaves undetermined an issue that will not down. Clearly, the denial of certiorari does not settle the question for as this Court has indicated "all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted" and "this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review" (Frankfurter, J., in *Maryland v. Baltimore Radio Show,* 338 U. S. 912, 919).

The question as to the power of the House Committee on Un-American Activities to compel the disclosure of private beliefs and associations has been presented to this Court in a number of cases on petitions for writs of certiorari. In a span of slightly over two years, five members of this Court have recorded their views that this question should be settled by the Supreme Court. In *Josephson v. United States,* 333 U. S. 838, Justices Douglas, Murphy and Rutledge were of the opinion that the petition for writ of certiorari should be granted. In *Eisler v. United States,* 335 U. S. 857, certiorari was granted, thus indicating that at least four Justices were

of the opinion that the same question as is presented herein should be answered by this Court. In *Eisler v. United States,* 338 U. S. 189, when the case was removed from the docket, Justices Jackson and Murphy noted their dissents and called for a settlement of this decisive constitutional question. In the proceedings here, Justices Black and Douglas have recorded their views that certiorari should be granted. It is respectfully submitted that technical considerations of different parties or changes in the composition of the Court should not stand as barriers to the grant of a petition for writ of certiorari where in a period of two years five Justices of this Court have considered a question to be of general importance "which has not been, but should be, settled by this Court." In substance, if not in form, the written and unwritten rules of this Court have been met, requiring the performance by this Court, it is respectfully submitted, of the duties imposed upon it by the Constitution. If, when the petition for a writ of certiorari was granted in *Eisler v. United States, supra,* the issue here was of sufficient general importance to warrant consideration by this Court, it has not become less so by the passage of time. As Justice Murphy stated (338 U. S. 189):

> "It is clear, however, . . ., that it is the importance of the legal issues, not the parties, which bring the case to this Court. Those issues did not leave when Eisler did. They remain here for decision; they are of the utmost importance to the profession and to the public."

Moreover, the opinion of Justice Jackson in the same case makes clear the anomaly between the grant of certiorari in the one case and the denial of certiorari in the instant case.

> "Under our practice, the grant of Eisler's petition meant that four Justices of this Court, at least, were in agreement that the questions he raised were of this description. His petition challenged the power of Congress and investigating committees, to hold, and to control the procedures of, investigations of this nature. These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon Congressional procedures as well. *No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here.*" (Emphasis added.)

It should be noted in this connection that while the petitioners here are only two in number, in actuality the decisions in these cases affect the rights of eight additional individuals. In the trial court, eight other members of the "Hollywood Ten" stipulated with the Government as to the facts of their own cases and submitted their cases subject to the "law of the decisions on appeal" in the *Lawson* and *Trumbo* cases, without entry of verdict or judgment "pending final determination of the appeals" in those two cases. The stipulations entered into between the Government and the eight other defendants protects their right to appeal from any judgment which may be rendered against them. Sound considerations of justice and the true administration of justice require, it is respectfully submitted, a settlement by this Court of

the fundamental constitutional question involved in all these cases. The assumption that this Court would act upon a full and complete record which squarely presented the issues motivated to a large extent the entry by these defendants into the stipulations. Since the denial of the writs of certiorari here is entirely inconclusive, it would appear to be an undue hardship to relegate the remaining defendants to further appeals to the lower court and to this Court for a final determination of the basic constitutional questions involved. The uncertainty created by the denial of the petitions for writs of certiorari will clog the judicial processes with burdens which a present decision by this Court could fruitfully resolve.

In addition to the fact that five Justices of this Court have recorded their views that the issues here are of general importance which should be settled in accordance with the rules of the Court, and the fact that the legal rights of eight other defendants have been attenuated by the decision denying the petitions for writs of certiorari, other circumstances have intervened since the filing of the petitions sufficiently important to warrant, it is respectfully submitted, the grant of these petitions for rehearing.

When this Court granted certiorari in *Joint Anti-Fascist Refugee Committee v. McGrath,* on March 13, 1950 (94 L. Ed. Adv. Op. 456), it was clear that more than four Justices of this Court believed that a serious question had been raised as to the scope of the Government's power to institute a "loyalty" program with due regard to the freedoms guaranteed by the First Amendment to the Constitution and the liberties protected by the Fifth Amendment to the Constitution. The same views undoubtedly obtained when this Court granted certiorari

in *Parker v. County of Los Angeles,* 337 U. S. 929, a state case involving liberties guaranteed by the due process clause of the Fourteenth Amendment. Indeed, it was so explicitly stated when the *Parker* case was held not ripe for constitutional adjudication (338 U. S. 327).

There is no basic distinction between the "loyalty oaths" involved in the aforesaid cases and the proceedings here. In each, the citizen's claim is that he is being compelled under oath by governmental bodies, be they legislative or executive, to reveal his private opinion, beliefs and associations in violation of rights guaranteed to him by the Constitution. The failure to vacate the decision of the court below leaves Congressional committees free through the process of investigation, to impose a loyalty check upon any person in these United States. Such a process is infinitely broader in scope than those which this Court has indicated merit review by this Court. By the grant of certiorari in one type of case and the denial of certiorari in another, when in substance, they are the same, "no one can know what the law is."

The result of the denial of certiorari in these cases, therefore, is to let loose upon the country a "loyalty" hunt and purge whose scope and consequences are fearsome to contemplate. More than one Justice of this Court is aware of the "prevailing pattern" of thought control, intimidation and harassment of liberal men and women now sweeping the country. The denial of certiorari in the cases here is a green light for the "village tyrants" to pursue a course which recent history teaches us can have only disastrous results for our democratic institutions. No citizen is free now, as a result of this Court's action, from inquiry into his ideas and associations. Each citizen

and his family are now the prey of any governmental official who may with impunity pry into their private lives and subject them to the ostracism of the community with the stigma of disloyalty. The list of one million "subversives" upon which the House Committee on Un-American Activities prides itself has now been permitted unlimited growth.

Because of the uncertainty created by this Court's action, the legal remedies afforded citizens against inroads into their liberties have become largely illusory. In Maryland, New York, New Jersey, California, Washington and Nevada cases are wending their way through the courts involving issues basically the same as those involved here. Sharp disagreements have been expressed by the different lower courts as to the constitutionality of measures requiring loyalty oaths and directing legislative and grand jury investigations into political beliefs of citizens. In the halls of Congress, a compulsory registration measure for all citizens commonly known as the Mundt-Nixon bill teeters on the brink of passage as outstanding constitutional law experts express their doubts as to its validity. So extreme has this rampage against the liberties of the people grown, that men high in office are not immune, with a resultant marked increase in international tensions. It is respectfully submitted that to a large extent the pattern of fear, intimidation and uncertainty now prevalent in the country is due to the failure of this Court decisively to settle this important constitutional question for the benefit of the public, the judiciary, the legal profession, and governmental officialdom as well.

The importance of this question and the need for its determination have been manifested in urgent manner,

Scores of briefs *amici curiae* have been submitted to this Court on this sole fundamental issue pointing to the dire need for a determination by this Court. These briefs have been signed by outstanding scientists, artists, trade union leaders, religious leaders, publishers, educators, scholars, lawyers and public citizens. The organizations whose briefs have been filed contain memberships which run in the hundreds of thousands, composed of citizens of the most diverse political, social and religious beliefs. It is fair to state that not a single newspaper, periodical or magazine in the country has failed to comment at one time or another upon the activities of the House Committee on Un-American Activities. Virtually every newspaper editor in the nation has assured the public that the question of the Committee's powers would be the subject of scrutiny by the Supreme Court of the United States.

The question raised in these proceedings has been the subject of extended discussion among the legal profession. The vast amount of legal literature issued in the last two years on the issues framed in these proceedings bears witness to the serious doubts existing in the minds of the legal profession concerning the apparent unlimited power of the House Committee. Throughout these writings there runs the constant refrain—"the question will have to be settled by the Supreme Court of the United States." In only the last two years, the following articles have appeared: McGeary, M. N., *Congressional Power of Investigation* in 28 Nebraska L. Rev. 516 (1949); Meader, G., *Limitations on Congressional Investigations* in 47 Michigan L. Rev. 775 (1949); Boudin, L. B., *Congres-*

sional and Agency Investigations in 35 Virginia L. Rev. 143 (1949); Shull, C. W., *Answer the Question: The Congressional Witness and His Quandary* in 23 Temple L. Q. 117 (1949); White, L. W., *Conflict Between Investigatory Powers of Congress and Constitutionally Guaranteed Individual Liberties* in 6 Washington & Lee L. Rev. 66 (1949); *Limits on Congressional Investigations* in 22 So. Calif. L. Rev. 464 (1949); Rudd, M. S., *Congressional Power of Investigation and Freedom of Speech* in 17 University of Cincinnati L. Rev. 264 (1948); Prescott, J. W., *Contempt Proceedings* in 1 Baylor L. Rev. 212 (1948); Davian, R. F., *House Committee on Un-American Activities, etc.,* in 37 Georgetown L. J. 104 (1948); Barlow, Jr., R. A., *Investigation of Political Beliefs* in 27 Nebraska L. Rev. 601 (1948); Murphy, Jr., E. E., *Legislative Contempt Power* in 26 Texas L. Rev. 816 (1948); Note, *Powers of Congress to Conduct Investigations Into One's Political Beliefs,* 22 Temple L. Q. 227 (1948); 34 Virginia L. Rev. 460 (1948); Note, *Separation of Powers—Congressional Investigatory Action,* 2 Rutgers University L. Rev. 125 (1948); Note, *Un-American Activities Committee,* 1 Vanderbilt L. Rev. (1948); Nutting, C. B., *Freedom of Silence* in 47 Michigan L. Rev. 181 (1948); Note, *Congressional Investigating Committee* in 16 George Washington L. Rev. 265 (1948); Notes, *Contempt of Congress* in 14 Brooklyn L. Rev. 276 (1948); 36 Illinois Bar J. 490 (1948); 20 Mississippi L. J. 81 (1948); Note, 96 University of Pennsylvania L. Rev. 381 (1948); Note, *Un-American*

Activities Committee, 43 Illinois L. Rev. 253 (1948); Martin, L. Ed., *Investigatory Powers of Congress* in 26 Washington University L. Q. 531 (1947); Note, *Constitutional Limitations on the Un-American Activities Committee,* 47 Columbia L. Rev. 416 (1947); Note, *Congressional Contempt Power,* 14 University of Chicago L. Rev. 256 (1947).

From all walks of life, therefore, both professional and public, has come the urgent request that this Court decide the most significant constitutional question to come before it in the last three decades. No one can measure what permanent inroads on American liberties have already been made by the depradations of the House Committee on Un-American Activities. Nevertheless, as the call for more and more purges of the civil service grows in volume, as the conflicts between boards of regents and academic staffs over loyalty oaths rock the campuses, as scientists in larger numbers leave their vocations in protest against political surveillance, as individual acts of violence against liberal men and women increase in alarming numbers, it becomes clear that ominous social and political changes are taking place in our institutions.

These changes permitted and sanctioned by governmental agencies run afoul the international obligations solemnly undertaken by the Charter of the United Nations, of which the Government of the United States is a signatory, provides in part that "all Members . . . shall fulfill in good faith the obligations assumed by them in

accordance with the present Charter" (Article 2); that "with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . (c) universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 55); and "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55" (Article 56).

The Declaration of Human Rights passed and promulgated by the General Assembly of the United Nations on December 10, 1948, and heartily supported by the United States delegation provides in part:

> "Article 19: Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> "Article 20: Everyone has the right to freedom of peaceful assembly and association."

The adherence of the United States to the Charter of the United Nations and the Declaration of Human Rights, the adherence of other countries to the Charter and Declaration, and the general American desire for international good will and cooperation cannot be ignored in

any consideration of the governmental policy of subjecting men to fine and imprisonment because they will not be forcibly coerced into revealing their political and trade union affiliations (compare dissenting opinion of Edgerton, J., in *Hurd v. Hodge,* 162 F. 2d 233, 245, reversed in 334 U. S. 24).

A national policy so deeply rooted in our institutions and the subject of binding international commitments is as much a part of the law of the land, it is respectfully submitted, as direct enactments of the legislature. The complaints of the petitioners here are that this fundamental policy of far-reaching domestic and international significance has been perverted by officials of government. This Court has the constitutional responsibility of seeing to it that such national policy is unobstructed (compare, *United States v. Pink,* 315 U. S. 203). Failure by this Court to hear the appeals of these petitioners may be inexplicable to the peoples and nations of the world and inconsistent with the positions taken by our representatives at home and abroad regarding universal respect for and observance of human rights.

Conclusion.

There are no considerations, it is respectfully submitted, which can outweigh the need for this Court to settle the constitutional question involved in these proceedings, a question "ripe for adjudication" and required to be settled by the mandate imposed by the Constitution upon this Court.

For the reasons herein set forth this petition for rehearing should be allowed and the petitions for writs of certiorari to the Court of Appeal for the District of Columbia be granted.

Respectfully submitted,

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Certificate of Counsel.

The undersigned is one of counsel for the petitioners Lawson and Trumbo, and one who has prepared the within petition for rehearing. In my judgment this petition is presented in good faith and is restricted to the grounds specified in Rule 33 of the Supreme Court. It is not interposed for delay.

ROBERT W. KENNY.

APPENDIX 1.

Voir Dire Questions Disallowed:

21. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Catholic Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, Mr. John Howard Lawson? (DENY.) (L. J. A. 104.)

22. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Protestant Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, John Howard Lawson? (DENY.) (L. J. A. 104.)

23. Supposing that a man were charged with contempt of Congress for allegedly refusing to answer the question: "Are you now, or have you ever been, a member of the Jewish Faith?" Would your attitude or frame of mind toward such a defendant be any different than your attitude or frame of mind toward the defendant, John Howard Lawson? (DENY.) (L. J. A. 104.)

25. Do you believe that man who it is claimed is a member of the Communist Party has any lesser right with respect to his politics and his political affiliations, than a man who it is claimed is a member of the Democratic Party? (DENY.) (L. J. A. 105.)

40. Do you feel it is your obligation as a juror sitting in an American Court of Justice, to render a verdict of acquittal if the evidence fails to establish guilt beyond a

reasonable doubt, even though you might thereby be subjected to criticism by some people? (DENY.) (L. J. A. 106.)

61. Would you be prejudiced against Mr. Lawson because he took the position that he should be permitted to answer questions in his own words and in his own way, without being limited by the Committee to a "yes" or "no" answer? (DENY.) (L. J. A. 110.)

64. Do you believe that a Congressional Committee has the right to be arbitrary and unreasonable in its procedure towards any witness before it? (DENY.) (L. J. A. 110.)

65. Do you believe that witness before a Congressional Committee is entitled to protest against any arbitrary conduct of any discrimination by such a Committee? (DENY.) (L. J. A. 110.)

66. Do you have any prejudice against a private citizen who is before a Congressional Committee as a witness and who protests because he is denied the right to make a statement when other witnesses were permitted to make theirs? (DENY.) (L. J. A. 110.)

67. Do you believe that a Congressional Investigating Committee can do no wrong? (DENY.) (L. J. A. 110.)

68. You agree, don't you, that a Congressional Commitee is limited by the Constitution of the United States and by the resolution which has created it? (DENY.) (L. J. A. 110.)

69. Do you believe that an individual has certain private rights which no Congressional Committee can inquire into? (DENY.) (L. J. A. 110.)

77. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which the

Committee claims to be un-American, but which group is actually set up for the purpose of advocating the passage of a Federal Anti-Lynching Law, would that prejudice you in any way against Mr. Lawson? (DENY.) (L. J. A. 111.)

78. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls un-American, but which group is actually set up for the purpose of advocating the elimination of the poll tax, would that prejudice you in any way against Mr. Lawson? (DENY.) (L. J. A. 111.)

79. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls subversive, but which group is actually set up for the purpose of advocating the adoption of a Federal Fair Employment Practices Act, would that prejudice you in any way? (DENY.) (L. J. A. 111.)

80. Supposing it appears from the evidence that Mr. Lawson is alleged to be affiliated with a group which this Committee calls subversive, but which group was actually set up for the purpose of defending the Scottsboro boys, would that prejudice you in any way? (DENY.) (L. J. A. 111.)

85. Suppose that the evidence in this case shows that certain witnesses before this Committee at this hearing were permitted to read prepared statements into the record; supposing it appears that Mr. Lawson attempted to read his own statement, but that the Committee refused to allow him to do so; suppose it further developed that Mr. Lawson sharply criticized the Committee for refusing to allow him to make a statement on his rights as an American citizen, would this fact prejudice you against Mr. Lawson? (DENY.) (L. J. A. 116.)

APPENDIX 2.

The Court Room Scene During Voir Dire:

Mr. Katz: We want the record to show our objection to the process by which Mr. Hitz proposed questions orally to the panel without our having had an opportunity in advance to interpose objections to those questions, in the manner in which the defense proceeded—that is, submitting an outline of proposed questions to the Government, the Court permitting the Government to be heard, and the Court ruling on the precise questions which the counsel for the defense could ask, before any questions were put to the jury.

The Court: Very well.

Mr. Katz: We should like the record further, Judge Curran, if you will be kind enough to do so, to contain some graphic depiction of the physical surroundings of the courtroom, showing where the defendant sat while Mr. Hitz interrogated the panel and where the panel itself sat, so that our record, if there is an appeal, may be presented in the form of giving the reviewing court as visually as possible a picturization of the setting.

We should like to have the record show, Mr. Hitz, if you will agree that this is the physical setup, that the panel—proposed jurors—sat in the rear of this courtroom, which is the Department No. 3; that between the panel of proposed jurors and the defendant there was a row, and there is a row, of seats occupied by ladies and gentlemen of the press; that between the panel—proposed jurors—and the ladies and gentlemen of the press there is then an aisle between the ladies and gentlemen of the press and the counsel table, at which the defendant and his

counsel sit; and that for the defendant to see the panel of jurors, he must look past this row of newspaper men and women.

The record should show our request that the impanelment of the jury take place in the form as follows: of having the proposed jurymen take and the box and be seated—

The Court: Now, look. I am conducting this trial.

Mr. Katz: I am not suggesting that you are not.

The Court: I do not want any more reference to that. I run this court in the way I deem proper.

Mr. Katz: I do not want to imply that you do not.

The Court: I do not want any more reference to the courtroom, the jurors, or where the defendant sat.

Mr. Katz: With the ruling, I shall, of course, refrain from making the statement which I should otherwise wish to make to complete the record. (L. J. A. 131-132.)